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NO.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

H. K. PORTER COMPANY, INC.,
Petitioner,

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; JOSEPH D. FOREST; HENRY ROBISON AND A. C. BURTTRAM, JR.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

From 1984 to 1987 H. K. Porter Company, Inc. lent money to Connors Steel Company, one of H. K. Porter's wholly owned subsidiaries, to help Connors pay for its collectively bargained obligation to provide hourly retirees and their surviving spouses with life and health insurance benefits until their attainment of age 65. H. K. Porter did this after Connors had permanently ceased operations and lacked the funds necessary to pay for those benefits. H. K. Porter did not hire any of Connors's former hourly employees and did not operate Connors's facility after it closed.

Two questions are presented.

1. Did H. K. Porter become the statutory successor to or assume Connors's retiree insurance obligation under *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972)?

2. Did the Eleventh Circuit fail to follow *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), when it found (i) that H. K. Porter used its control over Connors to perpetrate the violation of a positive legal duty; (ii) that such violation proximately injured respondents; and (iii) that the district court's findings of fact supported the application of *Burns*?

RULE 28.1 LISTING

Petitioner, H. K. Porter Company, and its wholly owned subsidiary, Connors Steel Company, were defendants in the proceedings below. Connors Steel Company is not a petitioner.

The respondents are the United Steelworkers of America, AFL-CIO-CLC, Joseph D. Forest, Henry Robison, and A. C. Burttram, Jr., for themselves and on behalf of the following class certified by the district court:

> All former hourly paid employees of Connors Steel Company and their surviving spouses who, as of January 1, 1987, were eligible to receive basic benefits under Sections 1 and 2 of the *Program Of Hospital-Medical Benefits for Eligible Pensioners and Surviving Spouses not Eligible for Medicare* (the "Health Plan") or who, as of January 1, 1987, elected to have a portion of their pension benefits withheld and applied toward the purchase of major medical benefits under Section 4 of the Health Plan or who elected to have a portion of their pension benefits withheld and applied toward the purchase of Medicare supplemental benefits under Sections 3.23 through 3.24 of the Health Plan
>
> plus
>
> all former hourly paid employees of Connors Steel Company who, as of January 1, 1987, had life insurance coverage under Section 1 of the *Program of Insurance Benefits for Hourly Paid Employees of Connors Steel Company.*

H. K. Porter holds an interest in the following companies:

1. Thermoid, Inc.
2. Peerless-Winsmith, Inc.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, H. K. Porter Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on September 28, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 855 F.2d 1499, and is reprinted in the appendix hereto, p. A-1, *infra.* The opinion, issued on petition for rehearing, vacated an earlier opinion of the court of appeals reported at 847 F.2d 707. The vacated opinion is reprinted in the appendix hereto, p. A-21, *infra.*

The memorandum opinion of the United States District Court for the Northern District of Alabama (Acker, J.) granting a permanent injunction against petitioner has not been reported. It is reprinted in the appendix hereto, p. A-40, *infra*. The memorandum opinion granting a preliminary injunction against petitioner has also not been reported. It is reprinted in the appendix hereto, p. A-49, *infra*.

JURISDICTION

Respondents brought this suit under § 301(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), and § 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a). On April 3, 1987, the district court entered a preliminary injunction against petitioner, and on June 11, 1987, entered a permanent injunction against petitioner.

Petitioner appealed to the Eleventh Circuit Court of Appeals under 28 U.S.C. § 1292(a)(1).

On June 16, 1988, the Eleventh Circuit entered a judgment and opinion affirming the district court.

Petitioner timely filed a petition for rehearing and suggestion of rehearing en banc. Upon consideration, the panel vacated its earlier judgment and opinion and entered a new judgment and opinion on September 28, 1988, still affirming the district court.

Petitioner timely filed a second petition for rehearing and suggestion of rehearing en banc, which was denied by an order dated October 31, 1988.

The jurisdiction of this Court to review the judgment and opinion of the Eleventh Circuit is timely invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 301(a) of the LMRA, 29 U.S.C. § 185(a), provides as follows:

> Suits for violation of contracts between an employer and

> a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 8(d) of the LMRA, 29 U.S.C. § 158(d), provides in pertinent part as follows:

> For purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

STATEMENT OF THE CASE

The relevant facts in this case — though few — extend over a period of some twenty to twenty-five years, and encompass a long-standing bargaining relationship between Connors Steel Company and the United Steelworkers of America.

H. K. Porter acquired the assets of Connors in 1950 and operated Connors as a division of H. K. Porter until 1974. (R-3, p. 106). The Steelworkers and H. K. Porter negotiated a series of collective bargaining agreements governing the terms and conditions of employment at Connors.

In 1974, H. K. Porter caused the incorporation of Connors as a wholly owned subsidiary. (R-3, p. 26). In that same year, the Steelworkers negotiated a collective bargaining agreement with the recently incorporated Connors that provided for life and health insurance benefits to retirees and their surviving spouses. (PX 23 & 24). H. K. Porter was not a party to the 1974 agreement.

The Steelworkers and Connors negotiated renewal labor agreements in 1977 and 1980. As in 1974, H. K. Porter was not a party to the agreements. The 1980 agreement defined the "Company" as "Connors Steel Company," and defined the covered bargaining unit as "all employees of the Company employed in and about the Company's plant, excluding salaried employees." (PX C & D; DX 69).

During the term of the 1980 agreement, Connors suffered severe and crippling financial losses. In 1982 and 1983, Connors and the Steelworkers negotiated two concession agreements. (DX 19, at depo. exh. 2; DX 21, p. 94). In 1982 and 1983, H. K. Porter also extended approximately 3.5 million dollars worth of credit to Connors to help it weather the crises. (DX 45).

As the time for expiration of the 1980 agreement approached, Connors and the Steelworkers entered into negotiations over a new contract. In making its proposed contract, Connors stated that if the Steelworkers did not accept it, Connors would be forced to close its plant and cease operations. (DX 13). The rank and file members of the Steelworkers twice refused to ratify the proposed contract. (DX 14 & 15). Accordingly, Connors closed its plant on September 1, 1983, the day after the 1980 agreement expired.

Although Connors had a negative net worth at the end of 1983, it continued to satisfy its obligation to existing retirees and their surviving spouses to provide them with life and health insurance benefits.[1] Connors did this with approximately 4.8 million dollars that H. K. Porter lent it from 1984 to 1987 (PX 10, at depo. exh. 15; DX 48).

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[1]Before the district court and the court of appeals, H. K. Porter and Connors contended — unsuccessfully — that Connors's obligation to provide life and health insurance benefits to its retirees ceased at the expiration of the 1980 agreement because the 1980 agreement provided that insurance benefits beyond the stated term were "subject to" collective bargaining between the parties and such bargaining failed to produce an agreement to replace the 1980 agreement. Without explanation, the district court and the Eleventh Circuit did not address the "subject to" language in the collective bargaining agreement.

On February 25, 1987, Connors notified its retirees[2] that because of extreme adverse financial conditions it would no longer provide them with life and health insurance benefits.

Connors then filed for relief under Chapter 7 of the Bankruptcy Code on March 10, 1987, leaving an unpaid debt to H. K. Porter of approximately 4.2 million dollars. (DX 51).

Respondents sued on March 6, 1987,[3] and obtained a preliminary injunction and certification of the case as a class action on April 3, 1987.[4]

In pertinent part, the preliminary injunction was based on the ground that H. K. Porter was Connors's "successor" under *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). In the district court's words . . .

> At least for the purpose of funding plaintiffs' benefits, H. K. Porter Company acted as a "successor employer" as that term is described in *N.L.R.B. v. Burns Security Services,* 406 U.S. 272, 284, 92 S. Ct. 1571, 1580 (1972). The *Burns* court noted that the "successor corporation," even though it had not signed the collective bargaining agreement, might decide to honor its provisions and thus be bound by them. Specifically, the Supreme Court said:
>
> > In many cases, of course, successor employers will find it advantageous not only to recognize and bargain with the Union but also *to observe the pre-existing contract rather than to face uncertainty and turmoil.* Also, in a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchased, *the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract.*
>
> 92 S. Ct. at 1584 (emphasis supplied). The Supreme

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[2]Throughout the remainder of this petition, the reference to retirees should be read as including surviving spouses.

[3]Respondents' complaint contained the following three counts: I, breach of a collective bargaining agreement (as to H. K. Porter, Count I was predicated upon the allegation that H. K. Porter was the alter ego of Connors); II, breach of fiduciary duty under ERISA; and III, interference with contractual relationships.

[4]The district court also stayed the action as to Connors on April 3, 1987.

Court further noted in *Howard Johnson Co. v. Detroit Local Joint Executive Board, Hotel, and Restaurant Employees,* 417 U.S. 249, 94 S. Ct. 2236 (1974) as follows:

> . . . the real question in each of these "successorship" cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative? *The answer to this inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue,* whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc. There is, and can be, no single definition of "successor" which is applicable in every legal context. *A new employer, in other words, may be a successor for some purposes and not for others.*
>
> 94 S. Ct. at 2243, n. 9 (emphasis supplied). While these cases deal with operating companies which have employees and with union contracts, and not with retiree's benefits, and thus are distinguishable, the legal principles may apply in the ERISA context, particularly where the benefits here were conferred pursuant to a collective bargaining agreement. In other words, by honoring Connors Steel Company's obligations, H. K. Porter Company may have assumed them.

Appendix, p. A-51, *infra* [emphases are the district court's].[5] In its order and memorandum opinion granting a permanent injunction against H. K. Porter, the district court "reconfirmed" its earlier successorship holding. Appendix, p. A-40, *infra.*[6]

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[5]Respondents did not allege in their complaint, nor argue in their memorandum of law to the district court, that H. K. Porter was Connors's successor. The district court's application of *Burns* appears to have been based on independent research.

[6]The other grounds for the district court's holding were (i) that H. K. Porter was Connors's alter ego, and therefore liable for Connors's breach of contract, and (ii), that H. K. Porter breached a fiduciary duty to respondents by ceasing to lend money to Connors for payment of the retirees' benefits. Neither of these theories remains as an independent basis for the decision below. The fiduciary duty theory, which was heavily briefed before the Eleventh Circuit, was not discussed in the Eleventh

The Eleventh Circuit affirmed, holding as follows:

> In addition to finding Porter liable as the alter ego of Connors, the trial court found Porter responsible as a "successor employer" as that term is defined in *N.L.R.B. v. Burns Security Services,* 406 U.S. 272, 284, 92 S. Ct. 1571, 1580, 32 L. Ed. 2d 61 (1972). As pointed out by the trial court, the Supreme Court said in *Burns*:
>
> > In many cases, of course, successor employers will find it advantageous not only to recognize and bargain with the union but also to observe the pre-existing contract rather than to face uncertainty and turmoil. Also, in a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchased, the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract.
>
> 406 U.S. at 291, 92 S. Ct. at 1584. Based largely upon the trial court's emphasis on the action of Porter in deciding to continue to pay the retirees' benefits between 1983 and 1987, the trial court found as a fact that "H. K. Porter Company acted as a successor employer." This was a fact finding that Porter had "assumed the obligations of the . . . contract." *Id.* We conclude that this finding was not clearly erroneous.

847 F.2d at 715; appendix, p. A-34, *infra* [emphases are the court's].

On petition for rehearing, the panel vacated its opinion and issued a second opinion reported at 855 F.2d 1499. In its new opinion, the Eleventh Circuit struck the last two sentences of the foregoing excerpt and, in lieu thereof, added the following:

Circuit's opinion except for a short paragraph setting forth "Facts as to ERISA Violations," and was expressly not made a basis for the court's decision. 855 F.2d at 1508; appendix, p. A-16, *infra* ("Because of our decision as to the alter ego and successor employer findings, it is unnecessary to consider any other basis for affirming the trial court's judgment that Porter is liable for continuing the insurance payments during the continuance of the lives of the plaintiff class."). Similarly, the alter ego theory, while discussed at length in the Eleventh Circuit's opinion, was expressly made dependent upon and secondary to the successorship theory. *See* n. 7, *infra.*

This finding [*i.e.*, the "successor employer" finding] was in the following language:

> At least for the purpose of funding plaintiffs' benefits, H. K. Porter Company acted as a "successor employer" as that term is described in *N.L.R.B. v. Burns Security Services,* 406 U.S. 272, 284, 92 S. Ct. 1571, 1580 (1972). The *Burns* court noted that the "successor corporation" even though it had not signed the collective bargaining agreement, might decide to honor its provisions and thus be bound by them.

This was a finding of fact that Porter had "assumed the obligations" under the collective bargaining agreement to pay these benefits.

Porter contends that this finding by the trial court is contrary to the Supreme Court's holding in *Burns.* It bases this contention on the fact that Connors had not been in an operating status for several years. We do not think this fact is conclusive, because 29 U.S.C. § 185(a) specifically authorizes actions under § 301 to be brought "for violation of contracts between an employer and a labor organization." This is precisely what we have here. The trial court here made this finding that the court stated in *Burns,* the N.L.R.B. "might properly find as a matter of fact" in an appropriate case.

855 F.2d at 1507; appendix, p. A-15, *infra.*[7]

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[7]The Eleventh Circuit's second opinion made successorship the ultimate basis for the court's holding. Specifically, the court held that the following three elements were required to be proved by respondents to establish liability under the alter ego doctrine: (i) complete domination and control of Connors by H. K. Porter with respect to the transaction attacked; (ii) use of such control by H. K. Porter to "commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of [respondents'] legal rights;" and (iii), injury to respondents proximately caused by H. K. Porter's control and breach of its duty. 855 F.2d at 1507; appendix, p. A-14, *infra.* The court then noted — in the following words — that although the district court had failed to address the second factor it was clear that H. K. Porter violated a "positive legal duty" because H. K. Porter was the successsor to Connors.

> The district court in this case did not address the question dealing with the second requirement outlined above; that is, whether the control which the court found existed was used by Porter "to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty or a dishonest and unjust act in contravention of plaintiff's legal

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Decison is Directly Contrary to this Court's Decision in *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

Because resolution of successorship cases "turns to a great extent on the precise facts involved," 406 U.S. at 274, it is appropriate and necessary to examine closely the facts of *Burns,* and to compare them to the facts of this case.

Burns was the successful bidder on a contract to provide security services at a Lockheed facility. After obtaining the contract, Burns hired twenty seven of the guards employed by its predecessor, Wackenhut. Burns also transferred fifteen guards from other Burns locations. Thus, a majority of Burns's bargaining unit employees at the new facility consisted of Wachenhut's former employees. Wackenhut's employees were represented by a union. Burns refused to honor the contract that Wackenhut had negotiated with the union, and refused to negotiate with the union on any new contract.

The National Labor Relations Board held that Burns had committed an unfair labor practice in failing to bargain with

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rights." However, inasmuch as we have concluded, in affirming the trial court, and as discussed *infra,* that Porter is liable to the plaintiff class as a successor corporation, it is clear that Porter used its control "to perpetrate the violation of a . . . positive legal duty". . .

There is no dispute about the fact that Porter caused the termination of the payments which we have heretofore held Connors was required to make to the plaintiff class. We conclude therefore that under the federal common law, as described by appellants, the trial court properly found that Porter was the alter ego of Connors with respect to the issues involved here.

855 F.2d at 1507. Successorship, thus, is revealed to be the sole independent ground of the Eleventh Circuit's decision. Clearly, if H. K. Porter had been found not to be the statutory successor of Connors, it would have been incumbent upon the Eleventh Circuit to remand this case to the district court for factual findings concerning at least the second factor (and also the third) of the three part test. The only reason why this did not occur is that the Eleventh Circuit affirmed the district court's successorship holding.

the union and in failing to honor Wackenhut's contract with the union. *Burns International Detective Agency, Inc.*, 182 N.L.R.B. No. 50, 74 L.R.R.M. 1098 (1970). The United States Court of Appeals for the Second Circuit enforced the Board's order with respect to the failure to bargain but denied enforcement in all other respects. 441 F.2d 911, 914-15 (2d Cir. 1971).

Upon consideration, this Court affirmed. With respect to that aspect of the Board's order concerning the refusal to bargain, the Court held that Burns was the statutory "successor" to Wackenhut because a majority of Burns's employees were former employees of Wachenhut who had been represented by the union, 406 U.S. at 278, and that, in becoming the "successor," Burns assumed an obligation under § 8(a)(5) of the LMRA, 29 U.S.C. § 158(a)(5), to bargain with Wackenhut's union. *Id.* "In [these] circumstances," stated the Court,

> it was not unreasonable for the Board to conclude that the union certified to represent all employees in the unit still represented a majority of the employees and that Burns could not reasonably have entertained a good-faith doubt about that fact.

406 U.S. at 278. In other words, given the majority status of Wackenhut's former employees, the conclusion reasonably followed that Burns should be held to an obligation under § 8(a)(5) to bargain with the union.

In contrast to the foregoing, however, the Court held that Burns was not bound by Wackenhut's labor contract with the union. 406 U.S. at 281-82. The Court based this portion of its holding on the policy embodied in Section 8(d) of the LMRA, 29 U.S.C. § 158(d), requiring parties to meet and negotiate in good faith but expressly disclaiming any requirement for either party to agree to a proposal or make a concession. Requiring Burns to honor the contract between Wackenhut and the union would, concluded the Court, have contravened the fundamental policy under the LMRA of "free-

dom of contract." 406 U.S. at 287 (following *H. K. Porter Co. v. N.L.R.B.*, 397 U.S. 99, 102, 108 (1970)).[8]

Although the Court held that successor employers are not bound by their predecessor's bargaining agreements, the Court also noted that,

> [i]n many cases, of course, successor employers will find it advantageous *not only* to recognize and bargain with the union *but also* to observe the pre-existing contract rather than to face uncertainty and turmoil. Also in a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchased, the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract. *C.f. Oilfield Maintenance Co.*, 142 NLRB 1384 (1963).

406 U.S. at 291 [emphasis added].

Nothing in *Burns* supports — and in fact everything in *Burns* is directly contrary to — the result reached by the Eleventh Circuit.

First, H. K. Porter did not, nor could it have, come under a § 8(a)(5) obligation to bargain with the Steelworkers over the benefits of Connors's retirees because H. K. Porter did not hire a single Connors bargaining unit employee when Connors closed its plant. The threshold requirement of *Burns* — that the successor hire a majority of its bargaining unit employees from the predecessor — was thus never satisfied. The LMRA protects "employee" rights. In the absence of an

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[8]The result in *Burns* was a logical and natural outgrowth of *H. K. Porter Co. See e.g., The Supreme Court, 1971 Term,* 86 Harv. L. Rev. 1, 254-55, n. 48 (1972), where it is stated as follows:

> Commentators had criticized the Second Circuit's decision in *Burns* for its total reliance on *H. K. Porter,* . . . in refusing enforcement of the order requiring Burns to honor its predecessor's agreement. It was argued that *H. K. Porter* limited the Board's remedial powers to compel agreement by negotiating parties to a substantive term in a collective bargaining agreement. *Burns,* on the other hand, involved enforcement of collective bargaining terms, not their initial determination. . . *The Court [in Burns] answered this argument by giving bargaining freedom a dual meaning to encompass enforcement of terms against a non-party as well as initial determination of terms.* [Citations omitted; emphasis added].

"employee-employer" relationship, §§ 7, 8(a)(5), and 8(d) of the LMRA are inapplicable.[9] This is elementary black letter labor law. But the Eleventh Circuit failed to follow it.[10]

Second, this Court's discussion in *Burns* of "assumption" was manifestly directed only to the company who, like Burns, has first come under a § 8(a)(5) obligation to bargain with the predecessor's union. As noted earlier, the Labor Board in *Burns* had held that Burns was required to honor Wackenhut's contract with the union. One of the stated policy objectives behind the Board's holding was the Board's desire to promote industrial peace. *See Burns International Detective Agency, Inc.,* 182 N.L.R.B. No. 50, 74 L.R.R.M. 1098, 1101 (1970). In overruling this aspect of the Board's holding, this Court nonetheless recognized that some employers who succeed to a § 8(a)(5) obligation to bargain with the predecessor's union may wish to avoid industrial strife by assuming the predecessor's labor contract. The "assumption" passage from *Burns* — upon which the Eleventh Circuit so centrally relied — does no more and no less than make this point.

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[9]*See e.g., Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.,* 404 U.S. 157 (1971) (retirees, because they are not employees within the meaning of the LMRA, are not protected by § 8(a)(5)).

[10]The district court had reservations about the application of *Burns* because the facts of *Burns* and this case are "distinguishable," appendix, p. A-52, *infra.* The district court never found — contrary to the Eleventh Circuit's statement that the district court made a finding of fact, appendix, p. A-16, infra. — that H. K. Porter assumed Connors's retiree insurance obligations under *Burns.* The district court, without any factual underpinnings, stated the following:

> While these cases [*i.e., Burns* and *Howard Johnson*] deal with operating companies which have employees and with union contracts, and not with retiree's benefits, and thus are distinguishable, the legal principals *may* apply in the ERISA context, particularly where the benefits here were conferred pursuant to a collective bargaining agreement. In other words, by honoring Connors Steel Company's obligations, H. K. Porter *may* have assumed them.

Appendix, p. A-51, 52, *infra* [emphasis added]. Respondents did not develop any reasoned argument in support of the application of *Burns* either in later proceedings before the district court or in their briefs to the Eleventh Circuit.

Nothing in the assumption passage or anywhere else in the Court's opinion in *Burns* indicates that the Court contemplated or envisioned the assumption of a collective bargaining agreement by an employer who had *not* come under a prior § 8(a)(5) obligation to bargain with the predecessor's union.[11]

Third, it is insufficient for the Eleventh Circuit to take refuge in the statement that the district court found as a "matter of fact" that H. K. Porter assumed Connors's obligation to its retirees under *Burns.* Not only is this an incorrect characterization of the district court's opinion, *see* n. 10, *supra,* but it also fails to recognize that the district court's decision proceeded upon an erroneous view of the law — erroneous because *Burns* simply does not and cannot apply to the facts of this case. *See Pullman-Standard v. Swint,* 456 U.S. 273, 291-92 (1982) (remand is proper when findings are based upon an erroneous view of the law).

Although the foregoing arguments were made to the Eleventh Circuit, the court erroneously stated H. K. Porter's argument as follows:

> . . . [H. K. Porter] bases this contention [*i.e.,* the inapplicability of *Burns*] on the fact that Connors had not been in an operating status for several years.

To the contrary, H. K. Porter contended before the Eleventh Circuit, and contends before this Court today, that *Burns*

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[11]The Court's citation in *Burns* to *Oilfield Maintenance Co.,* 142 N.L.R.B. 1384 (1963), reaffirms this point because the Board's finding there that the successor was required to honor the predecessor's contract could not have been made in the absence of the successor's underlying § 8(a)(5) obligation to the predecessor's union. *See* 53 L.R.R.M. at 1238. In addition, courts that have found the "assumption" of a labor contract by a successor have done so only when the successor has first come under a § 8(a)(5) obligation to bargain with the predecessor's union. *See e.g., Audit Services, Inc. v. Rolfson,* 641 F.2d 757, 762-63 (9th Cir. 1981); *N.L.R.B. v. World Evangelism, Inc.,* 656 F.2d 1349, 1354-55 (9th Cir. 1981); *United Steelworkers of America v. Deutz-Allis Corp.,* 122 L.R.R.M. 2035, 2036 (W.D. Mo. 1986). *See generally* 1 *The Developing Labor Law,* 744-45 (C. Morris 2d ed. 1983). It was *Rolfson,* we believe, that led the district court to apply *Burns.* But *Rolfson* involved a successor who hired substantially all of the predecessor's employees. 641 F.2d at 762-63.

does not apply unless the successor hires a majority of its employees from the predecessor. H. K. Porter never operated the Connors facility after it closed. H. K. Porter never hired a single "employee" of Connors.

In summary, respondents did not claim the applicability of *Burns*. The district court found that *Burns* "may" apply. The Eleventh Circuit raised this "may" statement to a finding of fact, and misstated the contention of H. K. Porter on the inapplicability of *Burns*. This chain of events produced a judgment against H. K. Porter for millions of dollars without addressing what H. K. Porter deems to be settled law.

II. The Eleventh Circuit Failed to Follow *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), when it found (i) that H. K. Porter Used its Control Over Connors to Perpetrate the Violation of a Positive Legal Duty; (ii) that Such Violation Proximately Injured Respondents; and (iii) that the District Court's Findings of Fact Supported the Application of *Burns*.

In its second opinion, 855 F.2d at 1506-07, the Eleventh Circuit also rewrote that portion of its opinion concerning the alter ego doctrine. As discussed at n. 7, *supra*, the panel's second opinion set forth the following three-part test, borrowed from *United Paperworkers International Union v. Penntech Papers, Inc.*, 439 F. Supp. 610 (D. Me. 1977), *aff'd*, 583 F.2d 33 (1st Cir. 1978):

> Restating the instrumentality [or the alter ego] rule we may say that in any case, except express agency, estoppel, or direct tort, three elements must be proved:
>
> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practices in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a

dishonest and unjust act in contravention of plaintiff's legal rights; and

(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

855 F.2d at 1507 (*quoting* from 439 F. Supp. at 618).[12] Also, as discussed at n. 7, *supra,* the Eleventh Circuit found that the district court "did not address" the second factor outlined above. *Id.* But the Eleventh Circuit did not then remand this case to the district court for futher findings consistent with the three-part test. Instead, the court proceeded to independently find that H. K. Porter had violated a "positive legal duty" to respondents.[13] In so doing, the Eleventh Circuit failed to follow basic rules of civil procedure and this Court's decision in *Pullman-Standard v. Swint,* 456 U.S. 273 (1982), *rev'g,* 624 F.2d 525 (5th Cir. 1980).

Swint teaches that,

> [w]hen an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings. . . . Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue. . . All this is elementary.

456 U.S. at 291-92. *Accord Maine v. Taylor,* 477 U.S. 131, 106 S. Ct. 2440, 2451 (1986). Although there are some limitations to this rule, *see e.g., Bose Corporation v. Consumers Union of United States, Inc.,* 466 U.S. 485, 498-99 (1984) (involving freedom of speech under the First Amendment), they do not apply here. Nor can it be said that the record premitted only one resolution of the factual issue. Whether H. K. Porter

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[12]The first opinion held that Alabama law on the alter ego doctrine — which does not require a showing of fraud in contract cases — applied instead of federal common law. *Appendix,* p. A-33. *C.f., Textile Workers Union of America v. Lincoln Mills of Alabama,* 353 U.S. 448, 456-57 (1957).

[13]The Eleventh Circuit also proceeded to independently find that H. K. Porter's breach of its duty proximately injured respondents.

abused its control over Connors in such a manner as to commit a fraud or wrong is a complicated factual inquiry requiring familiarity with a substantial record covering a period of 20 to 25 years. What that record shows is that H. K. Porter made loans to Connors during its economic crisis in 1982 and 1983 (DX 45). The record also shows that H. K. Porter continued to make these loans from 1984 to 1987 to the ultimate benefit — not detriment — of the retirees (PX 10, at depo. exh. 15; DX 48). At bottom, the retirees lost their benefits because, in the face of union intransigence, Connors was unable to operate profitably and closed its plant. How this series of events translates into H. K. Porter's misuse of its control to the proximate detriment of respondents remains unstated.[14] Nor is the district court's opinion enlightening on this point. The district court did find that H. K. Porter controlled Connors. Appendix, p. A-54, *infra* ("The court finds that enough of these factors do exist, without taking the time to mention each one, to indicate the necessary degree of control by H. K. Porter Company over Connors Steel Company . . . . "). But the district court never addressed — let alone made any findings concerning — the second factor of the three part test.

The Eleventh Circuit's treatment of the third factor of the three part test is equally as erroneous as its treatment of the second because the district court also failed to make any findings of fact as to this factor. The Eleventh Circuit did not remand for further findings as to this factor but only noted that,

> [t]here is no dispute about the fact that Porter caused the termination of the payments which we have heretofore held Connors was required to make to the plaintiff class.

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[14]As discussed in section II of the petition, *supra*, the Eleventh Circuit found the second factor of the three part test satisfied because H. K. Porter was the successor of Connors. But this misapprehends the findings that are required under the second factor. It is not enough, even assuming that H. K. Porter was Connors's successor, that H. K. Porter breached a contractual obligation. The question is whether H. K. Porter misused its *control* over Connors to commit a fraud or wrong or to avoid a positive legal obligation.

855 F.2d at 1507; appendix, p. A-15, *infra.* Putting aside the obvious point that without loans from H. K. Porter Connors could not pay for the retirees' benefits, the Eleventh Circuit again failed to follow *Swint* and again misconstrued the analysis required under the three part test. The third factor deals with proximate cause, not causation-in-fact. The question is whether the breach of duty proximately caused injury. The district court made no findings as to this question. The Eleventh Circuit — erroneously — found no fault with this.

Finally, the Eleventh Circuit failed to follow *Swint* when it erroneously concluded that the district court found "as a matter of fact" that H. K. Porter assumed Connors's retiree insurance obligations. As discussed in n. 10, *supra,* the district court made no such finding. The district court suggested that H. K. Porter "may" have assumed Connors's obligation by honoring it. The district court's "may" statement was not a finding of fact.

III. Corporations and Their Subsidiaries Engaged in Collective Bargaining Under Federal Law Require Guidance From this Court with Respect to the Circumstances In Which Liability for Postretirement Welfare Benefits Can Be Transferred from One Corporation to Another.

There has been a dramatic increase in litigation over employers' liability to provide postretirement welfare benefits.[15] Since 1984 alone, in addition to this case, there have been at least eleven circuit court decisions on this subject.[16]

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[15]"Welfare benefits" is a term of art defined in § 3(1) of ERISA, 29 U.S.C. § 1002(1), to include life and health insurance benefits.

[16]*Musto v. American General Corp.,* 861 F.2d 897 (6th Cir. 1988); *Moore v. Metropolitian Life Inc. Co.,* 856 F.2d 488 (2d Cir. 1988); *Anderson v. Alpha Portland Indus., Inc.,* 836 F.2d 1512 (8th Cir. 1988) (petition for certiorari pending); *District 29, UMWA v. UMWA 1974 Benefit Plan & Trust,* 826 F.2d 280 (4th Cir. 1987); *Hansen v. White Motor Corp.,* 788 F.2d 1186 (6th Cir. 1986); *Weimer v. Kurz-Kasch, Inc.,* 773 F.2d 669 (6th Cir. 1985); *Policy v. Powell Pressed Steel Co.,* 770 F.2d 609 (6th Cir. 1985), *cert. denied,* 475 U.S. 1017 (1986); *United Food & Commercial Workers Local 150-A v. Dubuque*

These decisions have not addressed the circumstances in which liability for collectively bargained postretirement welfare benefits can be transferred from a subsidiary to a parent corporation. The question who will pay for postretirement welfare benefits raises important public policy considerations about shifting of risk and legitimate expectations of the parties involved. This Court should address those considerations as they relate to collective bargaining under the LMRA.[17]

In the absence of a reversal by this Court, employers will look to the Eleventh Circuit's decision as a warning that traditional and accepted rules of law, particularly those rules governing collective bargaining, will be relaxed to the point of nonrecognition when the case involves retiree insurance benefits. The Eleventh Circuit's decision sends a strong signal that predictability of law and freedom of collective bargaining take a back seat to retirees' need for benefits. The Eleventh Circuit's decision effectively repudiates the forceful articulation in *H. K. Porter Co. v. N.L.R.B.*, 397 U.S. 99, 102, 108 (1970), of the fundamental policy of freedom of contract embodied in the LMRA. Rules of law, particularly the rules governing collective bargaining, must afford the parties a reasonable degree of predictability. Section 8(d) of the LMRA, as interpreted in *H. K. Porter* and *Burns,* has long stood for the following two propositions: (i) an employer may not be forced to accept a bargaining proposal that it in good faith does not wish to accept, and (ii) a bargaining agreement may not be enforced against a nonparty except in limited circumstances that are — as heretofore shown — not applicable in this case. The Eleventh Circuit's decision exemplifies the extreme philosophy that, so long as the result

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Packing Co., 756 F.2d 66 (8th Cir. 1985); *UAW v. Cadillac Malleable Iron Co.*, 728 F.2d 807 (6th Cir. 1984); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984); *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983) *cert. denied*, 465 U.S. 1007 (1984).

[17]The collective bargaining agreement in this case provided retiree insurance benefits for a stated three-year term and expressly provided that benefits thereafter were "subject to" negotiations between Connors and the Steelworkers.

reached is intuitively just (putting aside, for the moment, the difficult question whose intuition will be determinative), there should be no cause for concern that settled rules of labor law were ignored.

A prime example is the Eleventh Circuit's response to H. K. Porter's argument, made in both petitions for rehearing, that *Burns* can have nothing to do with this case. In the Eleventh Circuit's words . . .

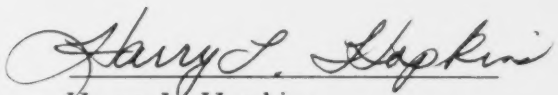
> Porter contends that this finding by the trial court is contrary to the Supreme Court's holding in *Burns*. It bases its contention on the fact that Connors had not been in an operating status for several years. We do not think this fact is conclusive, because 29 U.S.C. § 185(a) specifically authorizes actions under § 301 to be brought "for violation of contracts between an employer and a labor organization." That is precisely what we have here. The trial court here made this finding that the Court stated in *Burns*, the NLRB "might properly find as a matter of fact" in an appropriate case.

855 F.2d at 1507-08. H. K. Porter's argument was not, and is not, that the retirees may not sue under § 301(a) of the LMRA. Nor did H. K. Porter base its argument on the inapplicability of *Burns* on the fact that Connors had not been in operating status for several years. The question was and is whether *Burns* can apply when no "employees" are hired by the "successor." The Eleventh Circuit's opinion invokes *Burns* but reaches a result that is entirely contrary to *Burns*. It does not follow the law. It provides no principled basis for deciding this controversy.

CONCLUSION

For the foregoing reasons, H. K. Porter respectfully submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; Joseph D. Forest; Henry Roberson, A.C. Burttram, Jr., for themselves and all persons similarly situated, Plaintiffs-Appellees-Cross-Appellants,

v.

CONNORS STEEL COMPANY, a corporation, Defendant,

H.K. Porter Company, Inc., a corporation,

Defendant-Appellant-Cross-Appellee.

No. 87-7418.

United States Court of Appeals, Eleventh Circuit.

Sept. 28, 1988.

Rehearing and Rehearing En Banc Denied Oct. 31, 1988.

ON PETITION FOR REHEARING

(Opinion June 16, 1988, 11 Cir., 847 F.2d 707).

Before VANCE and EDMONDSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

The panel has decided to vacate its earlier opinion and judgment in this case, *United Steelworkers of America v. Connors Steel,* 847 F.2d 707 (11th Cir. 1988), and to substitute the following in its stead.

This is an appeal from a judgment of the trial court enjoining H.K. Porter Company from failing to continue payment of health and life insurance benefits to employees of Connors Steel Company, Porter's wholly owned subsidiary, after the class action against Connors had been stayed by the bankruptcy of Connors.

I. STATEMENT OF THE CASE

Plaintiffs are the United Steelworkers of America, AFL-CIO-CLC (the "Steelworkers"), and certain former hourly employees (including surviving spouses) of Connors Steel Company. Plaintiffs brought this action under § 301 of the Labor Management Relations Act (the "Labor Act"), 29 U.S.C. § 185(a), and § 502(a) of ERISA, 29 U.S.C. § 1132(a). Until February 28, 1987, the individual plaintiffs received life and health insurance benefits from Connors under the "1980 Pensioners Agreement" and the "1980 General Insurance Agreement" (collectively, the "1980 Insurance Agreements").

Plaintiffs filed their complaint on March 6, 1987. Plaintiffs also filed a motion for preliminary injunction and a motion to maintain the lawsuit as a class action.

On March 22, 1987, Connors filed for relief under Chapter 7 of the Bankruptcy Code. On April 3, 1987, the district court confirmed that this action was stayed as to Connors.

On March 24, 1987, the court held a hearing on plaintiffs' motion for class certification and motion for preliminary injunction. The court rendered its decision on April 3, 1987, granting both of plaintiffs' motions.

On April 20, 1987, H.K. Porter filed a motion to strike the jury demand in plaintiffs' complaint. The court granted that motion on May 11, 1987. On April 20, 1987, H.K. Porter also filed a motion for summary judgment to strike claims for extra-contractual compensatory and punitive damages.

On May 20, 1987, the court conducted a non-jury trial on the question whether H.K. Porter was liable to provide health and life insurance benefits to plaintiffs. On June 11, 1987, the court entered an order and memorandum opinion making the preliminary injunction against H.K. Porter permanent and granting H.K. Porter's motion for summary judgment "to the extent of dismissing all non-ERISA claims with prejudice." The court also "reconfirmed" its earlier findings and conclusions and struck plaintiffs' jury demand.

This appeal followed.

II. STATEMENT OF THE FACTS

A. *As to the obligation of Connors to continue payments.*

The material facts in this case occurred over approximately 25 years. They encompass the history of the operation by H.K. Porter of the Connors Steel Division of H.K. Porter Company and the operation of the later incorporated Connors Steel Company, and its relation to H.K. Porter, its sole owner, to the date of the bankruptcy of Connors in 1987.

In 1950, H.K. Porter acquired a steel making facility in Birmingham, Alabama called Connors Steel Company. H.K. Porter operated the plant as the Connors Steel Division of H.K. Porter Company. In 1956, H.K. Porter acquired another steel making facility in Huntington, West Virginia, and operated it as the West Virginia Works of the Connors Steel Division of H.K. Porter Company. H.K. Porter operated Connors Steel Company in this manner until 1974.

On March 22, 1974, H.K. Porter incorporated Connors as a separate subsidiary. H.K. Porter took this step, among other things, to limit its liability.

Beginning in 1974, the Steelworkers and Connors negotiated what was known as a "basic agreement" and a "general insurance agreement" and a "pensioner's agreement" (hereinafter collectively "the insurance agreements"). Each of these agreements ran for a term of years and was renegotiated in 1980. They were all negotiated with an employee of Connors, not of H.K. Porter. The agreements negotiated in 1980, which had an effective date of January 1, 1981, are those which are before the court for construction in this case. During its term, Connors suffered severe financial loss and several concessions were allowed by the Steelworkers and some others were denied by the Steelworkers. Finally, as the time for expiration of the 1980 agreement approached, Connors started to negotiate with the Steelworkers for a new contract. However, the negotiations came to an impasse. No new contract was agreed to.

Thereupon, Connors notified the retirees that their health and life insurance benefits would cease on September 31, 1983, the date of the expiration of the "basic agreement." Nevertheless, Connors continued to fund both the health and life benefits for plaintiffs' class with funds supplied by H.K. Porter for nearly four years. This was done on the advice of Porter's general counsel and vice president Moncrief.

In 1987, Porter found an increase in the costs of such funding unacceptable, and unilaterally stopped the benefits. This action then ensued. A few days later, Porter placed Connors under the protection of the bankruptcy court under Chapter 7.

There is no dispute between the parties as to the benefits granted to retirees under the 1980 agreement. The only question is whether such benefits were to be continued after the expiration of the underlying negotiated agreement. Included in the provisions of the health insurance agreement appears the following:

> *Continuation of Coverage.*
>
> 6. Any pensioner or individual receiving a surviving spouse's benefit who shall become covered by the program established by this agreement *shall not have such coverage terminated or reduced* (except as provided in this program) *so long as the individual remains retired from the company or receives a surviving spouse's benefit, notwithstanding the expiration of this agreement,* except as the company and the union may agree otherwise.

(Emphasis added.)

The insurance agreement provided as follows:

> *Life Insurance After Retirement*
>
> 8. Any employee who shall have retired and who shall have become entitled to basic life insurance after retirement pursuant to the provisions of the insurance agreement and booklet applicable to such employee at the time of retirement *shall not have such basic life insurance terminated or reduced* (except as provided in such booklet) *so long as he or she remains retired from the company, notwithstanding*

> *the expiration of such agreement* or booklet of this agreement, except as the company and the union may agree otherwise.

(Emphasis added.)

Appellant does not contend that the company and the union ever "agreed otherwise" that either of these coverages could be terminated or reduced.

In support of is contention that the health insurance and life insurance provided to retirees under the terms of the 1980 "basic agreement" were no longer effective after the expiration of the collective bargaining agreement it is necessary to consider the following provision in Section 20 of the 1980 basic agreement:

> Except as otherwise provided below, this Agreement shall terminate (sic) the expiration of sixty days after either party shall give written notice of termination to the other party but in any event shall not terminate earlier than September 1, 1983.
>
> If either party gives such notice *it may include notice of its desire to negotiate with respect to insurance, pensions,* the savings and vacation plan, and supplemental employment benefits (*existing provisions or agreements as to insurance, pensions,* the savings and vacation plan, and supplemental unemployment benefits *to the contrary notwithstanding*), and the parties shall meet within thirty days thereafter to negotiate with respect to such matters by the end of sixty days after the giving of such notice, either party may thereafter resort to strike or lock-out as the case may be in support of its position in respect to such matters as well as any other matters in dispute (*the existing agreements, or provisions with respect to insurance, pensions,* savings and vacation plan, and supplemental unemployment benefits *to the contrary notwithstanding*).

(Emphasis added).

B. *The facts as to the obligation of H.K. Porter Company to carry out the agreements made by Connors.*

The trial court under its heading "Findings of Fact" in its memorandum order supporting its preliminary injunction stated:

1. Petitioners have made a strong showing that they are likely to prevail on the merits. The evidence, while conflicting in certain important respects, particularly as to plaintiffs' *alter ego* theory, is clear that H.K. Porter Company continued to fund the hospital and medical benefits obligations of its wholly owned subsidiary, Connors Steel Company, long after Connors Steel Company was no longer an operating company and after Connors Steel Company was, by any reasonable definition of "insolvency", "insolvent". It is difficult to explain such sizable expenditures by a non-eleemosynary, stockholder-owned institution without there being a sense of legal obligation to make those expenditures. The payments may be explained by the language of the plans themselves, which must be construed in favor of its beneficiaries and which, reasonably construed, hold out to pre-1983 retirees and their survivors continued medical and life insurance benefits, even after the termination of the collective bargaining agreement which existed when the plans were last adopted.

. . . . .

Plaintiffs may have failed to prove by a preponderance of the evidence properly analyzed, the entire laundry list of twelve factors to be used in determining whether or not a parent corporation is the *alter ego* of its subsidiary. This list is outlined in *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 691 (5th Cir. 1985). Of course, it is not necessary that plaintiffs prove the existence of all twelve factors. The Fifth Circuit did not weight the twelve factors in their order of significance. The court finds that enough of these factors do exist, without taking the time to mention each one, to indicate the necessary degree of control by H.K. Porter Company over Connors Steel Company to constitute an *alter ego* relationship in this case.

Mem.Op. No. 87-AR-0374-S (M.D.Ala. Apr. 3, 1987).

The trial court in making further findings of fact in the hearing for permanent injunction stated:

The single most telling new evidence presented during the recent hearing on the issue of permanent injunctive relief, and on all other issues involving the liability of H.K. Porter to members of the plaintiff class, came from H.K. Porter's vice-president, general counsel

and member of its management committee, Lawrence E. Moncrief, who testified that it was he who incorporated Connors Steel Company in 1974 for the purpose of limiting the liability of H.K. Porter (Connors' sole shareholder), but that when the Birmingham plant of Connors closed in 1983 and terminated all of its operating employees he advised H.K. Porter that it should continue to fund the insurance obligations or benefits here in dispute. . . . It was not until insurance costs began to escalate that Mr. Moncrief went along with management's idea of Connors' filing for bankruptcy and H.K. Porter's contemporaneously discontinuing the insurance benefits for Connors' former employees. Neither Mr. Moncrief, as a corporate officer, nor H.K. Porter itself, was motivated in 1983, 1984, 1985 or 1986 by pure, unadulterated altruism. Corporate generosity begins at home, namely with the stockholders. Yet, H.K. Porter continued the benefits after the 1983 closing until January, 1987. . . . The court agrees with the legal opinion which Mr. Moncrief reached in 1983 and finds no reason to quarrel with that opinion simply because of H.K. Porter's unfavorable insurance cost experience in 1986.

The degree of Connors' autonomy from H.K. Porter was very questionable under the evidence received at the hearing which led to the preliminary injunction of April 3, 1987. Any lingering doubt on this subject has now been removed, and the court finds that insufficient Connors autonomy existed to insulate H.K. Porter from Connors' contractual obligations to its retired employees under this particular collective bargaining agreement and the collateral insurance agreements.

The *modus operandi*, except for occasional corporate minutes, did not really change when Connors was incorporated in 1974. The basic difference, which the court does not find decisive, is that collective bargaining agreements thereafter were negotiated between the Steelworkers and Connors instead of between the Steelworkers and H.K. Porter. Prior to 1974, Connors, then a division of H.K. Porter, already had its separate management, its separate accounting personnel, its separate bank account, and other areas of separation. If H.K. Porter was "in charge" of Connors before 1974, it was just as much "in charge" after 1974, except for certain

corporate formalities observed by Connors. Connors certainly knew both before and after 1974 who and where the "boss" was. For instance, Keith Garrity, president of H.K. Porter, hired a consulting firm to do an expensive study of Connors and charged the study to Connors without ever consulting Connors.

. . . . .

A one-stockholder annual meeting by Connors does not provide an absolute defense to plaintiffs' *alter ego* theory. Corporate niceties, even if observed, do not prove the lack of control necessary to establish real autonomy.

Another fact clearly appearing for the first time at the recent hearing is the looseness of the handling of H.K. Porter's "loans" to Connors. Although by the terms of the various notes from Connors to H.K. Porter, interest was required to be paid, interest rarely, if ever, was paid. This may be explained by Connors' poor performance, but it also indicates the degree of control which the parent corporation had over the subsidiary. Obviously, the "shots were called" in Pittsburgh.

. . . . .

H.K. Porter allowed Connors to enter into a collective bargaining agreement which, without this court's attempting to analyze its language, obligated Connors beyond the life of the agreement and for the lives of the retired employees. In allowing this agreement to be negotiated, H.K. Porter may have exercised faulty business judgment, but this court is not here being asked to rescue a corporation from its entrepreneurial mistake.

C. *Facts as to ERISA violation.*

The trial court found that H.K. Porter was the "plan administrator" as defined in ERISA, stating:

> Not only did H.K. Porter actually designate itself as the "plan administrator," in official forms filed with the appropriate governmental authorities, but Mr. Moncrief, in effect, conceded on the witness stand that H.K. Porter was the "plan administrator" after Connors ceased operations. Whatever obligation attaches to a "plan administrator" under ERISA by virtue of holding that office attached to H.K. Porter after Connors closed its Birmingham plant. . . .

> . . . In this case H.K. Porter was and is both the "sponsor" and the "administrator." Its fiduciary obligation to plaintiff was and is to honor the obligations which H.K. Porter assumed in fact and by operation of law when Connors ceased operations. The insurance rights of Connors retirees and their survivors vested upon retirement (as witnessed by their continued payment, while Connors' terminated employees received no such benefits). . . .

III. DISCUSSION

A. *Connors' liability for continuing insurance benefits.*

Appellant's argument overlooks the distinction between the right of the Steelworkers and the plaintiff class to have Connors continue to provide insurance benefits after the expiration of the basic agreement that, under the agreement, they had already contracted to provide for the retirees and the right of Connors to bargain over any *new* obligation differing from the basic agreement following its expiration.

It is difficult to construe the language of the insurance agreements in any manner other than as contended for by the plaintiffs. This language, as noted above, states that any individuals receiving benefits provided under the insurance agreement "shall not have such coverage terminated or reduced so long as the individual remains retired from the company or receives a surviving spouse's benefits, notwithstanding the expiration of this [basic] agreement." We consider this language to be unambiguous. It in no way conflicts with Article 20 of the basic agreement, which merely provides, in effect, that the benefits to be accorded *thereafter* are subject to bargaining. This view is fully supported by the decided cases, *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007, 104 S.Ct. 1002, 79 L.Ed.2d 234 (1984); *Weimer v. Kurz-Kasch*, 773 F.2d 669 (6th Cir. 1985). In neither of these cases was there a provision that benefits would not be terminated upon the expiration of the collective bargaining agreement. The court nevertheless held in each case that the intent of the parties was clear: they intended for the benefits to continue beyond the expiration

date of the negotiated contract. In *Yard-Man,* the language of the contract was as follows: "When the former employee has attained the age of 65 years then: (1) the company will provide insurance benefits equal to the active group benefits . . . for the former employee and his spouse."

The court held this provision ambiguous, because nothing within the particular language expressly stated what the benefits were for active employees. The court thereupon considered other language of the contract, and concluded that express use of durational language dealing with other benefits clearly implied that no such durational intent could be found here. The court construed the entire contract as resolving the ambiguity in favor of the retirees. The court said:

> *Yard-Man* urges that a general durational clause which provided that the collective bargaining agreement should remain in force until June 1, 1977 demonstrates an intent that all benefits described in the agreement also terminate at that date. We do not agree. The clause did not specifically refer to the duration of benefits. The persuasive considerations we have discussed demonstrate that retiree benefits were intended to outlive the collective bargaining agreement's life and outweigh any contrary implications derived from a routine duration clause terminating the agreement generally. Such an intent takes precedence over a non-specific general clause.

716 F.2d at 1482.

In *Weimer v. Kurz-Kasch, Inc., supra,* the contract before the court contained the following language:

> "The company shall pay the cost . . . [of the designated benefits] as long as such employee remains retired and unemployed, either by the company or by anyone else." The court then stated: "This court held in *Yard-Man* that a general duration or termination clause ending the collective bargaining agreement as of a certain date did not demonstrate an intent that all benefits described in the agreement terminate as of that date. 716 F.2d at 1482-83. *See also Bower v. Bunker Hill,* 725 F.2d 1221, 1223 (9th Cir. 1984) (stating that a retirement medical insurance plan, which lacked an explicit expiration date,

> was not necessarily bound by the expiration date of the labor management agreement). In light of the insurance provisions conditioning the grant of retiree insurance benefits only on the retirees remaining retired and unemployed, and in light of the parties' failure to specify that retirees' insurance benefits expired with the termination of the collective bargaining agreements, we hold that the general termination clause does not support a finding that retiree benefits ended when the agreements expired."

773 F.2d at 676.

We fully concur with the decisions of the Court of Appeals for the Sixth Circuit in these two cases, more especially since the insurance agreements here specifically stated that the pensioners "shall not have such coverage terminated or reduced . . . so long as the individual remains retired from the company or receives a surviving spouses's benefit, notwithstanding the expiration of this agreement."

The trial court was clearly correct in deciding that Connors' obligation to provide the insurance benefits continued after the expiration of the negotiated labor contract. *See also, Bower v. Bunker Hill Co.,* 725 F.2d 1221 (9th Cir. 1984); *U.A.W. v. Cadillac Malleable Iron Co.,* 728 F.2d 807 (6th Cir. 1984); *Local 150-A UFCW v. Dubuque Packing Co.,* 756 F.2d 66, 70 (8th Cir. 1985).

B. *Obligation of H.K. Porter Co. to carry out the agreements made by Connors.*

1. *The Alter Ego Principle*

(a) *Domination and Control*

The district court, in considering whether the alter ego doctrine should apply to this case, considered what the Court of Appeals for the Fifth Circuit called "a laundry list of factors to be used in determining whether a subsidiary is the alter ego of its parent." *United States v. Jon-T Chemicals, Inc.,* 768 F.2d 686 (5th Cir. 1985). These, the Court stated, "include" whether:

> (1) the parent and the subsidiary have common stock ownership;

(2) the parent and the subsidiary have common directors or officers;
(3) the parent and the subsidiary have common business departments;
(4) the parent and the subsidiary file consolidated financial statements and tax returns;
(5) the parent finances the subsidiary;
(6) the parent caused the incorporation of the subsidiary;
(7) the subsidiary operates with grossly inadequate capital;
(8) the parent pays the salaries and other expenses of the subsidiary;
(9) the subsidiary receives no business except that given to it by the parent;
(10) the parent uses the subsidiary's property as its own;
(11) the daily operations of the two corporations are not kept separate; and
(12) the subsidiary does not observe the basic corporate formalities, such as keeping separate books and records and holding shareholder and board meetings.

Id. at 691-92.

The court then stated:

> Plaintiffs may have failed to prove by a preponderance of the evidence, properly analyzed, the entire laundry list of twelve factors to be used in determining whether or not a parent corporation is the *alter ego* of its subsidiary. This list is outlined in *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 691 (5th Cir. 1985). Of course, it is not necessary that plaintiffs prove the existence of all twelve factors. The Fifth Circuit did not weight the twelve factors in their order of significance. The court finds that enough of these factors do exist, without taking the time to mention each one, to indicate the necessary degree of control by H.K. Porter Company over Connors Steel Company to constitute an *alter ego* relationship in this case.

The court also stated that after the full trial:

> The degree of Connors' autonomy from H.K. Porter was very questionable under the evidence received at the hearing which led to the preliminary injunction of April 3, 1987. Any lingering doubt on this subject has now

> been removed, and the court finds that insufficient Connors autonomy existed to insulate H.K. Porter from Connors' contractual obligations to its retired employees under this particular collective bargaining agreement and the collateral insurance agreements.

The trial court thus stated its findings in terms of "the necessary degree of control by H.K. Porter Company over Connors Steel Company" and in terms of the "autonomy" of Connors.

We have carefully reviewed the record and are satisified that Items 1, 4, 5 and 6 were present here and that Items 2, 3, 7, 8 and 10 partially existed between Connors and H.K. Porter for at least several years before Porter caused Connors to seek protection under the bankruptcy laws.

As the court noted in *Jon-T*:

> As we have noted, there is no litmus test for determining whether a subsidiary is the alter ego of its parent. Instead, we must look to the totality of the circumstances. Resolution of the *alter ego* issue is heavily fact-specific and as such, is peculiarly within the province of the trial court. Consequently in reviewing the district court's finding, we apply the clearly erroneous standard of review. . . . We will reverse only if, after reviewing the evidence as a whole, we are "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

Id. (Citations omitted).

Appellant does not seriously challenge the above standard for establishing control and domination by Porter. We are unpersuaded by its contention that the trial court's findings of fact thereabouts were without adequate support in the record. We conclude therefore that the trial court's decision that there was sufficient control and domination of Connors by Porter to satisfy this part of the alter ego requirement was not clearly erroneous.

(b) *Fraud or Other Wrong*

Appellants contend that even though the court might have properly found sufficient evidence of domination and

control by Porter to satisfy this part of the alter ego principle, it was also incumbent on the plaintiffs to prove some act of fraud or wrongful conduct by Porter. Although appellant contends that this section 301 action must be decided by federal law, it cited *United States v. Jon T Chemicals, Inc., supra,* in support of its contention. *Jon T* was a diversity case as are a number of the other cases cited by appellants for their contention as to the need for appellees' proving some kind of fraud or other wrongdoing which caused the injury to the plaintiffs below.

Nevertheless, we recognize that we are required to apply a body of federal common law that has developed in connection with section 301 in cases seeking to invoke the alter ego principle. This law is well stated by the district court in *United Paperworkers Intern. U. v. Penntech Papers,* 439 F.Supp. 610 (D.Me. 1977), *aff'd* 583 F.2d 33 (1st cir. 1978).

> Restating the instrumentality [or the alter ego] rule we may say that in any case, except express agency, estoppel, or direct tort, three elements must be proved:
>
> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practices in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Id. at 618.

The district court in this case did not address the question dealing with the second requirement outlined above; that is, whether the control which the court found existed was used by Porter "to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty or a dishonest and unjust act in contravention of plaintiff's legal

rights." However, inasmuch as we have concluded, in affirming the trial court, and as discussed *infra*, that Porter is liable to the plaintiff class as a successor corporation, it is clear that Porter used its control "to perpetrate the violation of a . . . positive legal duty". . . .

There is no dispute about the fact that Porter caused the termination of the payments which we have heretofore held Connors was required to make to the plaintiff class. We conclude therefore that under the federal common law, as described by appellants, the trial court properly found that Porter was the alter ego of Connors with respect to the issues involved here.

2. *H.K. Porter as Successor to Connors*

In addition to finding Porter liable as the alter ego of Connors, the trial court found Porter responsible as a "successor employer" as that term is described in *NLRB v. Burns Security Services,* 406 U.S. 272, 284, 92 S.Ct. 1571, 1580, 32 L.Ed.2d 61 (1972).

As pointed out by the trial court, the Supreme Court said in *Burns*:

> In many cases, of course successor employers will find it advantageous not only to recognize and bargain with the union but *also to observe the preexisting contract rather than to face uncertainty and turmoil.* Also in a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchased the board *might properly find as a matter of fact that the successor had assumed the obligations under the old contract.*

406 U.S. at 291, 92 S.Ct. at 1584. (Emphasis added.)

Based largely upon the trial court's emphasis on the action of Porter in deciding to continue to pay the retirees' benefits between 1983 and 1987, the trial court found as a fact that "H.K. Porter Company acted as a successor employer." This finding was in the following language:

> At least for the purpose of funding plaintiffs' benefits, H.K. Porter Company acted as a "successor employer" as that term is described in *N.L.R.B. v. Burns Security Services,* 406 U.S. 272, 284, 92S.Ct. 1571, 1580 (1972). The *Burns* Court noted that the "successor corporation"

> even though it had not signed the collective bargaining agreement, might decide to honor its provisions and thus be bound by them.

This was a finding of fact that Porter had "assumed the obligations" under the collective bargaining agreement to pay these benefits.

Porter contends that this finding by the trial court is contrary to the Supreme Court's holding in *Burns.* It bases this contention on the fact that Connors had not been in an operating status for several years. We do not think this fact is conclusive, because 29 U.S.C. § 185(a) specifically authorizes actions under § 301 to be brought "for violation of contracts between an employer and a labor organization." That is precisely what we have here. The trial court here made this finding that the Court stated in *Burns,* the NLRB "might properly find as a matter of fact" in an appropriate case.

3. *Other Grounds*

Because of our decision as to the alter ego and successor employer findings, it is unnecessary to consider any other basis for affirming the trial court's judgment that Porter is liable for continuing the insurance payments during the continuance of the lives of the plaintiff class.

C. *Cross-Appeal*

In the trial court's memorandum opinion, the following statement appears:

> As yet unruled upon is H.K. Porter's motion for partial summary judgment which seeks to preclude the plaintiff class from "recovering extra-contractual compensatory and punitive damages" and seeks to limit the "recovery to the amount of planned benefits claimed to be due and owing for claims incurred but unpaid." Because ERISA is clearly implicated here, the following ERISA authorities preclude plaintiffs from obtaining any relief except the relief allowed them under ERISA:
>
> *Metropolitan Life Insurance Co. v. Taylor,* 481 U.S. 58, 107 S.Ct. 1542 [95 L.Ed.2d 55] (1987)
>
> *Pilot Life Insurance Company v. Dedeaux,* 481 U.S. 41, 107 S.Ct. 1549 [95 L.Ed.2d 39] (1987)

> *Howard v. Parisian, Inc.*, 807 F.2d 1560 (11th Cir. 1987) (which preceded but correctly anticipated *Metropolitan Life* and *Pilot Life*)
>
> . . . Therefore, defendant's motion for partial summary judgment will be partially granted.

Appellees contend that they are entitled to recover extra-contractual damages for emotional distress and pain and suffering and also for punitive damages, both under ERISA and under Section 301 of the Labor Act. The trial court apparently concluded that ERISA pre-empted Section 301, because it cited two Supreme Court cases and one case from this court in support of its action in dismissing the claims for extra-contractual damages. However, the Supreme Court and this court in the cases cited dealt only with pre-emption by ERISA of state common law claims. They did not deal with the continued viability of actions brought under Section 301 of the Labor Act. Since the appellees have cross-appealed from the trial court's order dismissing "all non-ERISA claims" we must consider whether such a cause of action may still be pursued.

(1) *Damages Under ERISA*

It is clear that the Supreme Court has not yet decided whether extra-contractual damages can be recovered under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). However, appellants contend that the Supreme Court's decision in *Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985), supports their contention that no such claim for damages can be based on ERISA. In *Russell,* the Court concluded that ERISA's breach of fiduciary duty provision, Section 409(a), 29 U.S.C. § 1109(a), provided no express authority for an award of punitive damages to a beneficiary. The Court also declined to decide whether any other section of the ERISA statute might permit recovery on such a claim.

Nevertheless, the Court of Appeals for the Ninth Circuit in the recent case of *Sokol v. Bernstein,* 803 F.2d 532 (9th Cir. 1986), said:

> It is important to note that, mechanically applied to

> the present case, *Russell* is not dispositive; the district court herein relied on Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3) rather than on Section 409. However, a textual exegisis of the *Russell* opinion, combined with careful examination of the statute's structure and legislative history, compels the conclusion that damages for emotional distress are unavailable under Section 502(a)(3) as well as under Section 409.

803 F.2d at 534.

The Court also stated:

> *Russell* sheds light on another major reason to disallow recovery of extra-contractual damages under Section 502(a)(3) — Congress' glaring omission of any mention of extra contractual damages in general, or emotional distress in particular: "significantly, the statutory provision explicity authorizing a beneficiary to bring an action to enforce his rights under the plan — Section 502(a)(1)(b) . . — says nothing about the recovery of extra contractual damages, or about the possible consequences of delay in the planned administrative's processing of a disputed claim." *Id.* at 309. Again, there is nothing in this excerpt to indicate that the underlying reasoning does not apply to Section 502(a). . . .

Id. at 536.

The court also pointed out that it had previously arrived at the same conclusion in *Hancock v. Montgomery Ward Long Term Disability Trust,* 787 F.2d 1302, 1306-07 (9th Cir. 1986), which the court said was a binding precedent for the *Sokol* decision.

In *Sommers Drug Stores Co. Profit Sharing Trust v. Corrigan Enterprises, Inc.,* 793 F.2d 1456, 1462-64 (5th Cir. 1986), the court held that neither Section 502(a) nor Section 502(a)(3) permits a participant or beneficiary to recover punitive damages. *See also Powell v. Chesapeake & Potomac Co.,* 780 F.2d 419, 424 (4th Cir. 1984), which holds that Section 502(a)(3) does not permit the recovery of extra-contractual compensatory or punitive damages.

We agree with these decisions and conclude that the trial court correctly held that no extra-contractual damages were recoverable under ERISA in this case.

(2) *Damages Under Section 301 LMRA*

Appellees contend further, however, that they are entitled to recover such damages under Section 301 of LMRA. Since the trial court dismissed all non-ERISA claims, it must have dismissed the claim under Section 301 on the theory that no extra-contractual damages were recoverable under the Labor Act.

We conclude that the question whether such damages may be recovered under the LMRA depends upon whether the recoveries under that Act are to be considered equitable or legal. In arriving at that conclusion, it is also appropriate for us to be informed by the clear sayings of the Supreme Court in cases in which other issues may have been decided. Referring especially to the language of the Court in *Dedeaux, supra,* we note that the Court several times spoke of the value of having the ERISA remedy the *exclusive* remedy for failure properly to administer a plan. The Court said:

> The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argues strongly for the conclusion that ERISA's civil enforcement remedies were intended to be *exclusive.* Its conclusion is fully confirmed by the legislative history of the civil enforcement provisions. . . .

481 U.S. 41, 107 S.Ct. 1549, 1557, 95 L.Ed.2d 39 (1987) (emphasis added.)

While this language deals with the exclusivity principle as relating to the pre-emption of all state remedies, it is also an instructive statement that we should observe in attempting to construe the remedies that may be available under Section 301 of the LMRA.

The Court of Appeals for the Fifth Circuit in *Calamia v. Spivey,* 632 F.2d 1235 (1980), decided whether in a claim such as that now before us the plaintiff was entitled to a trial by jury. The court there held that the plaintiff's right depended upon whether the proceeding was one that sounded in equity or at law. The court stated:

> Since Congress has the power to entrust the enforcement of new rights to courts sitting as in equity, *Curtis v.*

> *Loether,* 415 U.S. 189 at 195 [94 S.Ct. 1005 at 1008, 39 L.Ed.2d 260 (1974)], the first step in determining the legal or equitable nature of an action such as this is to examine the intent of Congress. If congressional intent is not apparent the next step is to examine the "pre-merger custom with respect to such questions", looking at how similar actions were treated before the merger of law and equity. *Ross v. Bernhard,* 396 U.S. 531, 538 N. 10, 90 S.Ct. 733, 738 n. 10 [24 L.Ed.2d 729 (1970)]. *See also Curtis v. Loether, supra,* 415 U.S. at 195-96, 94 S.Ct. at 1009. . . .
>
> In the absence of any clear congressional intent, the Court in *Wardle* [*Wardle v. Central States, Southeast & Southwest Areas Pension Fund,* 627 F.2d 820 (7th Cir. 1980)] examined prior cases and determined that similar claims were previously considered equitable and that the kind of determination required—whether the pension fund acted arbitrarily and capriciously—was one traditionally performed by judges. *Wardle v. Central States Southeast & Southwest Areas Pension Fund, supra,* 627 F.2d at 829, 830. We concur in that determination.

632 F.2d at 1237.[1] *See also In re Vorpahl,* 695 F.2d 318 (8th Cir. 1982).

We conclude that the trial court did not err in holding that plaintiffs were not entitled to recover extra-contractual compensatory and punitive damages under Section 301 of the Labor Act.

IV. CONCLUSION

The appellees also cross-appealed from the denial by the trial court of a trial by jury. However, they urge this cross-appeal only in the event that this court should reverse the trial court's decision either on the appeal or cross-appeal. In view of the fact that we are affirming the trial court's judgment *in toto* we do not discuss the issue of the right to a jury trial.

The judgment is AFFIRMED.

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[1] In *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981) (en banc) this Court adopted as precedent all of the decisions of the former Fifth Circuit decided prior to October 1, 1981.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; Joseph D. Forest; Henry Roberson, A.C. Burttram, Jr., for themselves and all persons similarly situated, Plaintiffs-Appellees-Cross-Appellants,

v.

CONNORS STEEL COMPANY, a corporation, Defendant,

H.K. Porter Company,, Inc., a corporation, Defendant-Appellant-Cross-Appellee.

No. 87-7418.

United States Court of Appeals, Eleventh Circuit.

June 16, 1988.

Appeal from the United States District Court of the Northern District of Alabama.

Before VANCE and EDMONDSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

This is an appeal from a judgment of the trial court enjoining H.K. Porter Company from failing to continue payment of health and life insurance benefits to employees of Connors Steel Company, Porter's wholly owned subsidiary, after the class action against Connors had been stayed by the bankruptcy of Connors.

I. STATEMENT OF THE CASE

Plaintiffs are the United Steelworkers of America, AFL-CIO-CLC (the "Steelworkers"), and certain former hourly employees (including surviving spouses) of Connors Steel Company. Plaintiffs brought this action under § 301 of the Labor Management Relations Act (the "Labor Act"), 29 U.S.C. § 185(a), and § 502(a) of ERISA, 29 U.S.C. § 1132(a). Until February 28, 1987, the individual plaintiffs received

life and health insurance benefits from Connors under the "1980 Pensioners Agreement" and the "1980 General Insurance Agreement" (collectively, the "1980 Insurance Agreements").

Plaintiffs filed their complaint on March 6, 1987. Plaintiffs also filed a motion for preliminary injunction and a motion to maintain the lawsuit as a class action.

On March 22, 1982, Connors filed for relief under Chapter 7 of the Bankruptcy Code. On April 3, 1987, the district court confirmed that this action was stayed as to Connors.

On March 24, 1987, the court held a hearing on plaintiffs' motion for class certification and motion for preliminary injunction. The court rendered its decision on April 3, 1987, granting both of plaintiffs' motions.

On April 20, 1987, H.K. Porter filed a motion to strike the jury demand in plaintiffs' complaint. The court granted that motion on May 11, 1987. On April 20, 1987, H.K. Porter also filed a motion for summary judgment to strike claims for extra-contractual compensatory and punitive damages.

On May 20, 1987, the court conducted a non-jury trial on the question whether H.K. Porter was liable to provide health and life insurance benefits to plaintiffs. On June 11, 1987, the court entered an order and memorandum opinion making the preliminary injunction against H.K. Porter permanent and granting H.K. Porter's motion for summary judgment "to the extent of dismissing all non-ERISA claims with prejudice." The court also "reconfirmed" its earlier findings and conclusions and struck plaintiffs' jury demand.

This appeal followed.

II. STATEMENT OF THE FACTS

A. *As to the obligation of Connors to continued payments.*

The material facts in this case occurred over approximately 25 years. They encompass the history of the operation by H.K. Porter of the Connors Steel Division of H.K. Porter Company and the operation of the later incorported Connors Steel Company, and its relation to H.K. Porter, its sole owner, to the date of the bankruptcy of Connors in 1987.

In 1950, H.K. Porter acquired a steel making facility in Birmingham, Alabama called Connors Steel Company. H.K. Porter operated the plant as the Connors Steel Division of H.K. Porter Company. In 1956, H.K. Porter acquired another steel making facility in Huntington, West Virginia, and operated it as the West Virginia Works of the Connors Steel Division of H.K. Porter Company. H.K. Porter operated Connors Steel Company in this manner until 1974.

On March 22, 1974, H.K. Porter incorporated Connors as a separate subsidiary. H.K. Porter took this step, among other things, to limit its liability.

Beginning in 1974, the Steelworkers and Connors negotiated what was known as a "basic agreement" and a "general insurance agreement" and a "pensioner's agreement" (hereinafter collectively "the insurance agreements"). Each of these agreements ran for a term of years and was renegotiated in 1980. They were all negotiated with an employee of Connors, not of H.K. Porter. The agreements negotiated in 1980, which had an effective date of January 1, 1981, are those which are before the court for construction in this case. During its term, Connors suffered severe financial loss and several concessions were allowed by the Steelworkers and some others were denied by the Steelworkers. Finally, as the time for expiration of the 1980 agreement approached, Connors started to negotiate with the Steelworkers for a new contract. However, the negotiations came to an impasse. No new contract was agreed to.

Thereupon, Connors notified the retirees that their health and life insurance benefits would cease on September 31, 1983, the date of the expiration of the "basic agreement." Nevertheless, Connors continued to fund both the health and life benefits for plaintiffs' class with funds supplied by H.K. Porter for nearly four years. This was done on the advice of Porter's general counsel and vice president Moncrief.

In 1987, Porter found an increase in the costs of such funding unacceptable, and unilaterally stopped the benefits. This action then ensued. A few days later, Porter placed

Connors under the protection of the bankruptcy court under Chapter 7.

There is no dispute between the parties as to the benefits granted to retirees under the 1980 agreement. The only question is whether such benefits were to be continued after the expiration of the underlying negotiated agreement. Included in the provisions of the health insurance agreement appears the following:

Continuation of Coverage.

6. Any pensioner or individual receiving a surviving spouse's benefit who shall become covered by the program established by this agreement *shall not have such coverage terminated or reduced* (except as provided in this program) *so long as the individual remains retired from the company or receives a surviving spouse's benefit, notwithstanding the expiration of this agreement,* except as the company and the union may agree otherwise.

(Emphasis added.)

The insurance agreement provided as follows:

Life Insurance After Retirement

8. Any employee who shall have retired and who shall have become entitled to basic life insurance after retirement pursuant to the provisions of the insurance agreement and booklet applicable to such employee at the time of retirement *shall not have such basic life insurance terminated or reduced* (except as provided in such booklet) *so long as he or she remains retired from the company, notwithstanding the expiration of such agreement* or booklet of this agreement, except as the company and the union may agree otherwise.

(Emphasis added.)

Appellant does not contend that the company and the union ever "agreed otherwise" that either of these coverages could be terminated or reduced.

In support of its contention that the health insurance and life insurance provided to retirees under the terms of the 1980 "basic agreement" were no longer effective after the expiration of the collective bargaining agreement it is necessary to consider the following provision of Section 20 of the 1980 basic agreement:

> Except as otherwise provided below, this Agreement shall terminate (sic) the expiration of sixty days after either party shall give written notice of termination to the other party but in any event shall not terminate earlier than September 1, 1983.
>
> If either party gives such notice *it may include notice of its desire to negotiate with respect to insurance, pensions,* the savings and vacation plan, and supplemental employment benefits (*existing provisions or agreements as to insurance, pensions,* the savings and vacation plan, and supplemental unemployment benefits *to the contrary notwithstanding*), and the parties shall meet within thirty days thereafter to negotiate with respect to such matters by the end of sixty days after the giving of such notice, either party may thereafter resort to strike or lock-out as the case may be in support of its position in respect to such matters as well as any other matters in dispute (*the existing agreements, or provisions with respect to insurance, pensions,* savings and vacation plan, and supplemental unemployment benefits *to the contrary notwithstanding*).

(Emphasis added.)

B. *The facts as to the obligation of H.K. Porter Company to carry out the agreements made by Connors.*

The trial court under its heading "Findings of Fact" in its memorandum order supporting its preliminary injunction stated:

> 1. Petitioners have made a strong showing that they are likely to prevail on the merits. The evidence, while conflicting in certain important respects, particularly as to plaintiffs' *alter ego* theory, is clear that H.K. Porter Company continued to fund the hospital and medical benefits obligations of its wholly owned subsidiary, Connors Steel Company, long after Connors Steel Company was no longer an operating company and after Connors Steel Company was, by any reasonable definition of "insolvency", "insolvent". It is difficult to explain such sizable expenditures by a non-eleemosynary, stockholder-owned institution without there being a sense of legal obligation to make those expenditures. The payments may be explained by the language of the plans themselves, which must be construed in favor of its

beneficiaries and which, reasonably construed, hold out to pre-1983 retirees and their survivors continued medical and life insurance benefits, even after the termination of the collective bargaining agreement which existed when the plans were last adopted.

. . . . .

Plaintiffs may have failed to prove by a preponderance of the evidence properly analyzed, the entire laundry list of twelve factors to be used in determining whether or not a parent corporation is the *alter ego* of its subsidiary. This list is outlined in *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 691 (5th Cir. 1985). Of course, it is not necessary that plaintiffs prove the existence of all twelve factors. The Fifth Circuit did not weight the twelve factors in their order of significance. The court finds that enough of these factors do exist, without taking the time to mention each one, to indicate the necessary degree of control by H.K. Porter Company over Connors Steel Company to constitute an *alter ego* relationship in this case.

Mem.Op. No. 87-AR-0374-S (M.D.Ala. Apr. 3, 1987).

The trial court in making further findings of fact in the hearing for permanent injunction stated:

The single most telling new evidence presented during the recent hearing on the issue of permanent injunctive relief, and on all other issues involving the liability of H.K. Porter to members of the plaintiff class, came from H.K. Porter's vice-president, general counsel and member of its management committee, Lawrence E. Moncrief, who testified that it was he who incorporated Connors Steel Company in 1974 for the purpose of limiting the liability of H.K. Porter (Connors' sole shareholder), but that when the Birmingham plant of Connors closed in 1983 and terminated all of its operating employees he advised H.K. Porter that it should continue to fund the insurance obligations or benefits here in dispute. . . . It was not until insurance costs began to escalate that Mr. Moncrief went along with management's idea of Connors' filing for bankruptcy and H.K. Porter's contemporaneously discontinuing the insurance benefits for Connors' former employees. Neither Mr. Moncrief, as a corporate officer, nor H.K. Porter itself, was motivated in 1983, 1984,

1985 or 1986 by pure, unadulterated altruism. Corporate generosity begins at home, namely with the stockholders. Yet, H.K. Porter continued the benefits after the 1983 closing until January, 1987. . . . The court agrees with the legal opinion which Mr. Moncrief reached in 1983 and finds no reason to quarrel with that opinion simply because of H.K. Porter's unfavorable insurance cost experience in 1986.

The degree of Connors' autonomy from H.K. Porter was very questionable under the evidence received at the hearing which led to the preliminary injunction of April 3, 1987. Any lingering doubt on this subject has now been removed, and the court finds that insufficient Connors autonomy existed to insulate H.K. Porter from Connors' contractual obligations to its retired employees under this particular collective bargaining agreement and the collateral insurance agreements.

The *modus operandi,* except for occasional corporate minutes, did not really change when Connors was incorporated in 1974. The basic difference, which the court does not find decisive, is that collective bargaining agreements thereafter were negotiated between the Steelworkers and Connors instead of between the Steelworkers and H.K. Porter. Prior to 1974, Connors, then a division of H.K. Porter, already had its separate management, its separate accounting personnel, its separate bank account, and other areas of separation. If H.K. Porter was "in charge" of Connors before 1974, it was just as much "in charge" after 1974, except for certain corporate formalities observed by Connors. Connors certainly knew both before and after 1974 who and where the "boss" was. For instance, Keith Garrity, president of H.K. Porter, hired a consulting firm to do an expensive study of Connors and charged the study to Connors without ever consulting Connors.

. . . . .

A one-stockholder annual meeting by Connors does not provide an absolute defense to plaintiffs' *alter ego* theory. Corporate niceties, even if observed, do not prove the lack of control necessary to establish real autonomy.

Another fact clearly appearing for the first time at the recent hearing is the looseness of the handling of H.K. Porter's "loans" to Connors. Although by the terms of

the various notes from Connors to H.K. Porter, interest was required to be paid, interest rarely, if ever, was paid. This may be explained by Connors' poor performance, but it also indicates the high degree of control which the parent corporation had over the subsidiary. Obviously, the "shots were called" in Pittsburgh.

. . . . .

H.K. Porter allowed Connors to enter into a collective bargaining agreement which, without this court's attempting to analyze its language, obligated Connors beyond the life of the agreement and for the lives of the retired employees. In allowing this agreement to be negotiated, H.K. Porter may have exercised faulty business judgment, but this court is not here being asked to rescue a corporation from its entrepreneurial mistake.

C. *Facts as to ERISA violation*

The trial court found that H.K. Porter was the "plan administrator" as defined in ERISA, stating:

Not only did H.K. Porter actually designate itself as the "plan administrator," in official forms filed with the appropriate governmental authorities, but Mr. Moncrief, in effect, conceded on the witness stand that H.K. Porter was the "plan administrator" after Connors ceased operations. Whatever obligation attaches to a "plan administrator" under ERISA by virtue of holding that office attached to H.K. Porter after Connors closed its Birmingham plant. . . .

. . . In this case H.K. Porter was and is both the "sponsor" and the "administrator." Its fiduciary obligation to plaintiff was and is to honor the obligations which H.K. Porter assumed in fact and by operation of law when Connors ceased operations. The insurance rights of Connors retirees and their survivors vested upon retirement (as witnessed by their continued payment, while Connors' terminated employees received no such benefits). . . .

III. DISCUSSION

A. *Connors' liability for continuing insurance benefits.*

Appellant's argument overlooks the distinction between the right of the Steelworkers and the plaintiff class to

have Connors continue to provide insurance benefits after the expiration of the basic agreement that, under the agreement, they had already contracted to provide for the retirees and the right of Connors to bargain over any *new* obligation differing from the basic agreement following its expiration.

It is difficult to construe the language of the insurance agreements in any manner other than as contended for by the plaintiffs. This language, as noted above, states that any individuals receiving benefits provided under the insurance agreement "shall not have such coverage terminated or reduced so long as the individual remains retired from the company or receives a surviving spouse's benefits, notwithstanding the expiration of this [basic] agreement." We consider this language to be unambiguous. It in no way conflicts with Article 20 of the basic agreement, which merely provides, in effect, that the benefits to be accorded *thereafter* are subject to bargaining. This view is fully supported by the decided cases, *UAW v. Yard-Man, Inc.,* 716 F.2d 1476 (6th Cir. 1983), *cert. denied,* 465 U.S. 1007, 104 S.Ct. 1002, 79 L.Ed.2d 234 (1984); *Weimer v. Kurz-Kasch,* 773 F.2d 669 (6th Cir. 1985). In neither of these cases was there a provision that benefits would not be terminated upon the expiration of the collective bargaining agreement. The court nevertheless held in each case that the intent of the parties was clear: they intended for the benefits to continue beyond the expiration date of the negotiated contract. In *Yard-Man,* the language of the contract was as follows: "When the former employee has attained the age of 65 years then: (1) the company will provide insurance benefits equal to the active group benefits . . . for the former employee and his spouse."

The court held this provision ambiguous, because nothing within the particular language expressly stated what the benefits were for active employees. The court thereupon considered other language of the contract, and concluded that express use of durational language dealing with other benefits clearly implied that no such durational intent could be found here. The court construed the entire contract as resolving the ambiguity in favor of the retirees. The court said:

> *Yard-Man* urges that a general durational clause which provided that the collective bargaining agreement should remain in force until June 1, 1977 demonstrates an intent that all benefits described in the agreement also terminate at that date. We do not agree. The clause did not specifically refer to the duration of benefits. The persuasive considerations we have discussed demonstrate that retiree benefits were intended to outlive the collective bargaining agreement's life and outweigh any contrary implications derived from a routine duration clause terminating the agreement generally. Such an intent takes precedence over a non-specific general clause.

716 F.2d at 1482.

In *Weimer v. Kurz-Kasch, Inc., supra,* the contract before the court contained the following language:

> "The company shall pay the cost . . . [of the designated benefits] as long as such employee remains retired and unemployed, either by the company or by anyone else." The court then stated: "This court held in *Yard-Man* that a general duration or termination clause ending the collective bargaining agreement as of a certain date did not demonstrate an intent that all benefits described in the agreement terminate as of that date. 716 F.2d at 1482-83. *See also Bower v. Bunker Hill,* 725 F.2d 1221, 1223 (9th Cir. 1984) (stating that a retirement medical insurance plan, which lacked an explicit expiration date, was not necessarily bound by the expiration date of the labor management agreement). In light of the insurance provisions conditioning the grant of retiree insurance benefits only on the retirees remaining retired and unemployed, and in light of the parties' failure to specify that retirees' insurance benefits expired with the termination of the collective bargaining agreements, we hold that the general termination clause does not support a finding that retiree benefits ended when the agreements expired."

773 F.2d at 676.

We fully concur with the decisions of the Court of Appeals for the Sixth Circuit in these two cases, more especially since the insurance agreements here specifically stated that the pensioners "shall not have such coverage terminated or

reduced . . . so long as the individual remains retired from the company or receives a surviving spouses's benefit, notwithstanding the expiration of this agreement."

The trial court was clearly correct in deciding that Connors' obligation to provide the insurance benefits continued after the expiration of the negotiated labor contract. *See also, Bower v. Bunker Hill Co.,* 725 F.2d 1221 (9th Cir. 1984); *UAW v. Cadillac Malleable Iron Co.,* 728 F.2d 807 (6th Cir. 1984); *Local 150-A UFCW v. Dubuque Packing Co.,* 756 F.2d 66, 70 (8th Cir. 1985).

B. *Obligation of H.K. Porter Co. to carry out the agreements made by Connors.*

1. *The Alter Ego Principle*

(a) *Domination and Control*

The district court, in considering whether the alter ego doctrine should apply to this case, considered what the Court of Appeals for the Fifth Circuit called "a laundry list of factors to be used in determining whether a subsidiary is the alter ego of its parent." *United States v. Jon-T Chemicals, Inc.,* 768 F.2d 686 (5th Cir. 1985). These, the Court stated, "include" whether:

(1) the parent and the subsidiary have common stock ownership;
(2) the parent and the subsidiary have common directors or officers;
(3) the parent and the subsidiary have common business departments;
(4) the parent and the subsidiary file consolidated financial statements and tax returns;
(5) the parent finances the subsidiary;
(6) the parent caused the incorporation of the subsidiary;
(7) the subsidiary operates with grossly inadequate capital;
(8) the parent pays the salaries and other expenses of the subsidiary;
(9) the subsidiary receives no business except that given to it by the parent;
(10) the parent uses the subsidiary's property as its own;

(11) the daily operations of the two corporations are not kept separate; and
(12) the subsidiary does not observe the basic corporate formalities, such as keeping separate books and records and holding shareholder and board meetings.

Id. at 691-92.

The court then stated:

> Plaintiffs may have failed to prove by a preponderance of the evidence, properly analyzed, the entire laundry list of twelve factors to be used in determining whether or not a parent corporation is the *alter ego* of its subsidiary. This list is outlined in *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 691 (5th Cir. 1985). Of course, it is not necessary that plaintiffs prove the existence of all twelve factors. The Fifth Circuit did not weight the twelve factors in their order of significance. The court finds that enough of these factors do exist, without taking the time to mention each one, to indicate the necessary degree of control by H.K. Porter Company over Connors Steel Company to constitute an *alter ego* relationship in this case.

The court also stated after the full trial:

> The degree of Connors' autonomy from H.K. Porter was very questionable under the evidence received at the hearing which led to the preliminary injunction of April 3, 1987. Any lingering doubt on this subject has now been removed, and the court finds that insufficient Connors autonomy existed to insulate H.K. Porter from Connors' contractual obligations to its retired employees under this particular collective bargaining agreement and the collateral insurance agreements.

The trial court thus stated its findings in terms of "the necessary degree of control by H.K. Porter Company over Connors Steel Company" and in terms of the "autonomy" of Connors.

We have carefully reviewed the record and are satisified that Items 1, 4, 5 and 6 were present here and that Items 2, 3, 7, 8 and 10 partially existed between Connors and H.K. Porter for at least several years before Porter caused Connors to seek protection under the bankruptcy laws.

As the court noted in *Jon-T*:

> As we have noted, there is no litmus test for determining whether a subsidiary is the alter ego of its parent. Instead, we must look to the totality of the circumstances. Resolution of the *alter ego* issue is heavily fact-specific and, as such, is peculiarly within the province of the trial court. Consequently in reviewing the district court's finding, we apply the clearly erroneous standard of review. . . . We will reverse only if, after reviewing the evidence as a whole, we are "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

Id. (Citations omitted).

We conclude, therefore, that the trial court's decision that there was sufficient control and domination of Connors by Porter to satisfy the alter ego requirement was not clearly erroneous.

(b) *Fraud, Injustice, or Inequitable Consequences*

Appellants contend that even though the court might have properly found sufficient evidence of domination by Porter to satisfy the alter ego principle, it was also incumbent on the plaintiffs to prove some act of fraud by Porter, citing the *Jon-T* case itself. Appellees respond, correctly, we conclude, that the law applied in the *Jon-T* case was the local law of the State of Texas, whereas the law applicable here is the Alabama law. They then cite the Alabama case, *Kwick Set Components, Inc. v. Davidson Industries, Inc.*, 411 So.2d 134 (Ala. 1982) which says: "The theory of separate corporate existence can properly be discarded, *even in the absence of fraud, to prevent injustice or inequitable consequences. Woods v. Commercial Contractors, Inc.*, (Ala.), 384 So.2d 1076 (1980)." 411 So.2d at 136 (Emphasis added.)

The Alabama court then quoted from the opinion in *Forest Hill Corp. v. Latter & Blum, Inc.*, 249 Ala. 23, 29 So.2d 298 (1947) as follows: "The courts will not 'allow the corporate entity to successfully masquerade through its officers, stockholders, representatives or associates *so as to defeat the payment of its just obligations.' Id.* at 28, 29 So.2d 298." 411 So.2d at 137. (Emphasis added.)

There can be no doubt that Porter's continuing to pay the obligations due by Connors to the retirees for their insurance benefits lulled the plaintiff class into a sense of false security as to their need to buy their own life insurance, the premiums for which would, of course, become higher each year between 1983 and 1987 when Porter stopped making the payments under the insurance agreements.

Moreover, by quoting from *Forest Hill Corp.*, the Alabama Supreme Court in *Kwick Set* made it clear that the alter ego principle would apply if the domination by Porter would "defeat the payment of its just obligations." Once the trial court found that the obligations of Connors became the obligation of Porter, because of the latter's assumption through its conduct in continuing the payments after Porter ceased operations, Porter's obligations to the plaintiff class were certainly "just obligations" that Porter's action "defeat-[ed]."

2. H.K. Porter as Successor to Connors

In addition to finding Porter liable as the alter ego of Connors, the trial court found Porter responsible as a "successor employer" as that term is described in *N.L.R.B. v. Burns Security Services,* 406 U.S. 272, 284, 92 S.Ct. 1571, 1580, 32 L.Ed.2d 61 (1972). As pointed out by the trial court, the Supreme Court said in *Burns*:

> In many cases, of course, successor employers will find it advantageous not only to recognize and bargain with the union but also to observe the pre-existing contract rather than to face uncertainty and turmoil. Also, in a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchased, the board might properly find as a matter of fact that the successor had assumed the obligations under the old contract.

406 U.S. at 291, 92 S.Ct. at 1584.

Based largely upon the trial court's emphasis on the action of Porter in deciding to continue to pay the retirees' benefits between 1983 and 1987, the trial court found as a fact that "H.K. Porter Company acted as a successor employer." This was a fact finding that Porter had "assumed the obligations

of the . . . contract." *Id.* We conclude that this finding was not clearly erroneous.

3. *Other Grounds*

Because of our decision as to the alter ego and successor employer findings, it is unnecessary to consider any other basis for affirming the trial court's judgment that Porter is liable for continuing the insurance payments during the continuance of the lives of the plaintiff class.

(c) Cross-Appeal

In the trial court's memorandum opinion, the following statement appears:

> As yet unruled upon is H.K. Porter's motion for partial summary judgment which seeks to preclude the plaintiff class from "recovering extra-contractual compensatory and punitive damages" and seeks to limit the "recovery to the amount of planned benefits claimed to be due and owing for claims incurred but unpaid." Because ERISA is clearly implicated here, the following ERISA authorities preclude plaintiffs from obtaining any relief except the relief allowed them under ERISA:
>
> *Metropolitan Life Insurance Co. v. Taylor*, ___ U.S. ___, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987)
>
> *Pilot Life Insurance Company v. Dedeaux*, ___ U.S. ___, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987)
>
> *Howard v. Parisian, Inc.*, 807 F.2d 1560 (11th Cir. 1987) (which preceded but correctly anticipated *Metropolitan Life* and *Pilot Life*)
>
> . . . Therefore, defendant's motion for partial summary judgment will be partially granted.

Appellees contend that they are entitled to recover extra contractual damages for emotional distress and pain and suffering and also for punitive damages, both under ERISA and under Section 301 of the Labor Act. The trial court apparently concluded that ERISA pre-empted Section 301, because it cited two Supreme Court cases and one case from this court in support of its action in dismissing the claims for extra contractual damages. However, the Supreme Court and this court in the cases cited dealt only with pre-emption

by ERISA of state common law claims. They did not deal with the continued viability of actions brought under Section 301 of the Labor Act. Since the appellees have cross-appealed from the trial court's order dismissing "all non-ERISA claims" we must consider whether such a cause of action may still be pursued.

(1) Damages Under ERISA

It is clear that the Supreme Court has not yet decided whether extra contractual damages can be recovered under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). However, appellants contend that the Supreme Court's decision in *Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985), supports their contention that no such claim for damages can be based on ERISA. In *Russell,* the Court concluded that ERISA's breach of fiduciary duty provision, Section 409(a), 29 U.S.C. § 1109(a), provided no express authority for an award of punitive damages to a beneficiary. The Court also declined to decide whether any other section of the ERISA statute might permit recovery on such a claim.

Nevertheless, the Court of Appeals for the Ninth Circuit in the recent case of *Sokol v. Bernstein,* 803 F.2d 532 (9th Cir. 1986), said:

> It is important to note that, mechanically applied to the present case, *Russell* is not dispositive; the district court herein relied on Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3) rather than on Section 409. However, a textual exegisis of the *Russell* opinion, combined with careful examination of the statute's structure and legislative history, compels the conclusion that damages for emotional distress are unavailable under Section 502(a)(3) as well as under Section 409.

803 F.2d at 534.

The Court also stated:

> *Russell* sheds light on another major reason to disallow recovery of extra contractual damages under Section 502(a)(3)—Congress' glaring omission of any mention of extra contractual damages in general, or emotional distress in particular: "significantly, the statutory provi-

> sion explicity authorizing a beneficiary to bring an action to enforce his rights under the plan—Section 402(a)(1)(b) . .—says nothing about the recovery of extra contractual damages, or about the possible consequences of delay in the planned administrative's processing of a disputed claim." *Id.* at 309. Again, there is nothing in this excerpt to indicate that the underlying reasoning does not apply to Section 502(a). . . .

The court also pointed out that it had previously arrived at the same conclusion in *Hancock v. Montgomery Ward Long Term Disability Trust,* 787 F.2d 1302, 1306-07 (9th Cir. 1986), which the court said was a binding precedent for the *Sokol* decision.

In *Sommers Drug Stores Co. Profit Sharing Trust v. Corrigan Enterprises, Inc.,* 793 F.2d 1456, 1462-64 (5th Cir. 1986), the court held that neither Section 502(a)(2) nor Section 502(a)(3) permits a participant or beneficiary to recover punitive damages. *See also Powell v. Chesapeake & Potomac Co.,* 780 F.2d 419, 424 (4th Cir. 1985), which holds that Section 502(a)(3) does not permit the recovery of extra contractual compensatory or punitive damages.

We agree with these decisions and conclude that the trial court correctly held that no extra contractual damages were recoverable under ERISA in this case.

(2) Damages Under Section 301 LMRA

Appellees contend further, however, that they are entitled to recover such damages under Section 301 of LMRA. Since the trial court dismissed all non-ERISA claims, it must have dismissed the claim under Section 301 on the theory that no extra contractual damages were recoverable under the Labor Act.

We conclude that the question whether such damages may be recovered under the LMRA depends upon whether the recoveries under that Act are to be considered equitable or legal. In arriving at that conclusion, it is also appropriate for us to be informed by the clear sayings of the Supreme Court in cases in which other issues may have been decided. Referring especially to the language of the Court in *Dedeaux, supra,* we note that the Court several times spoke of the value

of having the ERISA remedy the *exclusive* remedy for failure properly to administer a plan. The Court said:

> The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argues strongly for the conclusion that ERISA's civil enforcement remedies were intended to be *exclusive*. Its conclusion is fully confirmed by the legislative history of the civil enforcement provisions. . . .

___ U.S. ___, 107 S.Ct. 1549, 1557, 95 L.Ed.2d 39 (1987) (emphasis added.)

While this language deals with the exclusivity principle as relating to the pre-emption of all state remedies, it is also an instructive statement that we should observe in attempting to construe the remedies that may be available under Section 301 of the LMRA.

The Court of Appeals for the Fifth Circuit in *Calamia v. Spivey,* 632 F.2d 1235 (1980), decided whether in a claim such as that now before us the plaintiff was entitled to a trial by jury. The court there held that the plaintiff's right depended upon whether the proceeding was one that sounded in equity or at law. The court stated:

> Since Congress has the power to entrust the enforcement of new rights to courts sitting as in equity, *Curtis v. Loether,* 415 U.S. 189 at 195, 94 S.Ct. 1005 at 1009, 39 L.Ed.2d 260 (1974), the first step in determining the legal or equitable nature of an action such as this is to examine the intent of Congress. If congressional intent is not apparent the next step is to examine the "pre-merger custom with respect to such questions", looking at how similar actions were treated before the merger of law and equity. *Ross v. Bernhard,* 396 U.S. 531, 538 n. 10, 90 S.Ct. 733, 738 n. 10, 24 L.Ed.2d 729 (1970). *See also Curtis v. Loether, supra,* 415 U.S. at 195-96, 94 S.Ct. at 1009. . . .
>
> In the absence of any clear congressional intent, the Court in *Wardle* [*Wardle v. Central States, Southeast & Southwest Areas Pension Fund,* 627 F.2d 820 (7th Cir. 1980)] examined prior cases and determined that similar claims were previously considered equitable and that the kind of determination required—whether the pension fund acted arbitrarily and capriciously—was one tradi-

> tionally performed by judges. *Wardle v. Central States Southeast & Southwest Areas Pension Fund, supra,* 627 F.2d at 829, 830. We concur in that determination.

632 F.2d at 1237.[1] *See also In re Vorpahl,* 695 F.2d 318 (8th Cir. 1982).

We conclude that the trial court did not err in holding that plaintiffs were not entitled to recover extra contractual compensatory and punitive damages under Section 301 of the Labor Act.

IV. CONCLUSION

The appellees also cross-appealed from the denial by the trial court of a trial by jury. However, they urge this cross-appeal only in the event that this court should reverse the trial court's decision either on the appeal or cross-appeal. In view of the fact that we are affirming the trial court's judgment *in toto* we do not discuss the issue of the right to a jury trial.

The judgment is AFFIRMED.

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[1] In *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981) (en banc) this Court adopted as precedent all of the decisions of the former Fifth Circuit decided prior to October 1, 1981.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, ET AL., ETC., Plaintiffs	)	
VS.	)	CIVIL ACTION 87-AR-0374-S
H. K. PORTER COMPANY, INC., a corporation, Defendant	)	

MEMORANDUM OPINION

The court conducted a trial on the merits in this cause on May 27, 1987, and heard testimony and received documentary evidence in addition to that heard and received at the hearing for preliminary injunction. The parties have filed excellent post-trial briefs. No purpose would be served by repeating the findings and conclusions reached by the court on April 3, 1987. They are here reconfirmed. At defendants' request, however, the court will clarify what it meant on April 3, 1987, when it said: "The evidence, while conflicting in certain important respects, particularly as to plaintiffs' *alter ego* theory, [etc.]." By this language the court did not mean to imply that there were major conflicts between witnesses so as to necessitate a weighing of credibility. The court was referring to conflicting inferences to be drawn from the evidence. Certainly credibility was not and is not crucial to the outcome in this case. Because much of the evidence is in the form of documents, depositions and transcribed testimony from other proceedings, credibility determinations have simply not been factors essential to the reaching of a decision.

As yet unruled upon is H. K. Porter's motion for partial summary judgment which seeks to preclude the plaintiff

class "from recovering extra-contractual compensatory and punitive damages" and seeks to limit the "recovery to the amount of plan benefits claimed to be due and owing for claims incurred but unpaid". Because ERISA is clearly implicated here, the following recent authorities preclude plaintiffs from obtaining any relief except the relief allowed them under ERISA:

Metropolitan Life Insurance Co. v. Taylor, ___ U.S. ___, 107 S.Ct. 1542 (1987)

Pilot Life Insurance Company v. Dedeaux, ___ U.S. ___, 107 S.Ct. 1549 (1987)

Howard v. Parisian, Inc., 807 F.2d 1560 (11th Cir. 1987) (which preceded but correctly anticipated *Metropolitan Life* and *Pilot Life*)

In reaching this conclusion the court not only agrees with itself in its lower court opinion which resulted in *Howard v. Parisian, Inc.* on appeal, but with Honorable Robert B. Propst of this court in *Webster v. John Deere Dealer Group Trust, et al.*, CV 87-PT-115-S, decided on May 20, 1987. Therefore, defendant's motion for partial summary judgment will be partially granted. By the terms of defendant's motion defendant would eliminate plaintiffs' claim for the possible attorney's fees provided by ERISA for a prevailing plaintiff. This claim and all other ERISA claims will remain. What constitutes an ERISA claim under these overall circumstances remains a debatable question. If H. K. Porter means to argue that ERISA precludes any and all relief sought in this particular case, this court disagrees with H. K. Porter. ERISA was designed to protect plan beneficiaries, not to take away all of their contract rights and expectations.

Further Findings of Fact

The single most telling new evidence presented during the recent hearing on the issue of permanent injunctive relief, and on all other issues involving the liability of H. K. Porter to members of the plaintiff class, came from H. K. Porter's vice-president, general counsel and member of its management committee, Lawrence E. Moncrief, who testified that it was he who incorporated Connors Steel Company in 1974

for the purpose of limiting the liability of H. K. Porter (Connors' sole shareholder), but that when the Birmingham plant of Connors closed in 1983 and terminated all of its operating employees he advised H. K. Porter that it should continue to fund the insurance obligations or benefits here in dispute. He logically distinguished the facts in Connors' Birmingham situation from the facts in Connors' West Virginia situation. This court does not presume to express an opinion on the question of the continuing insurance obligations, if any, of H. K. Porter to Connors' former employees at the West Virginia plant, except to say that there were and are more reasons for continuing such obligations to the retired *Birmingham* employees than to the retired employees in *West Virginia.* It was not until insurance costs began to escalate that Mr. Moncrief went along with management's idea of Connors' filing for bankruptcy and H. K. Porter's contemporaneously discontinuing the insurance benefits for Connors' former employees. Neither Mr. Moncrief, as a corporate officer, nor H. K. Porter itself, was motivated in 1983, 1984, 1985 or 1986 by pure, unadulterated altruism. Corporate generosity begins at home, namely with the stockholders. Yet, H. K. Porter continued the benefits after the 1983 closing until January, 1987. The court is impressed by Mr. Moncrief's frankness and perspicacity, and finds him to be both a careful lawyer and a loyal corporate officer. The court agrees with the legal opinion which Mr. Moncrief reached in 1983 and finds no reason to quarrel with that opinion simply because of H. K. Porter's unfavorable insurance cost experience in 1986.

The degree of Connors' autonomy from H. K. Porter was very questionable under the evidence received at the hearing which led to the preliminary injunction of April 3, 1987. Any lingering doubt on this subject has now been removed, and the court finds that insufficient Connors autonomy existed to insulate H. K. Porter from Connors' contractual obligations to its retired employees under this particular collective bargaining agreement and the collateral insurance agreements.

The *modus operandi,* except for occasional corporate min-

utes, did not really change when Connors was incorporated in 1974. The basic difference, which the court does not find decisive, is that collective bargaining agreements thereafter were negotiated between the Steelworkers and Connors instead of between the Steelworkers and H. K. Porter. Prior to 1974, Connors, then a division of H. K. Porter, already had its separate management, its separate accounting personnel, its separate bank account, and other areas of separation. If H. K. Porter was "in charge" of Connors before 1974, it was just as much "in charge" after 1974, except for certain corporate formalities observed by Connors. Connors certainly knew both before and after 1974 who and where the "boss" was. For instance, Keith Garrity, president of H. K. Porter, hired a consulting firm to do an expensive study of Connors and charged the study to Connors without ever consulting Connors.

Except for the five million dollars in stock originally purchased by H. K. Porter when Connors was incorporated in 1974 everything was a "loan" from the parent. In 1974, Alabama required that a corporation, in order to be formed, must be capitalized with no less than $1,000.00 in cash or its equivalent. Title 10 § 21(5), Ala. Code (Cum. Supp. 1973). When Connors gave its mortgage and promissory note to H. K. Porter for $15,000,000 at incorporation, H. K. Porter delivered to Connors title to all of the real property, equipment and inventory in Birmingham. For aught appearing this obligation from Connors to H. K. Porter was five million dollars more than the then fair market value of the said real property, equipment and inventory received. Of course, if this were true, the property was, in effect, overvalued in the amount of H. K. Porter's ostensible capital contribution, in which event *there was no capital contribution.* The court is not saying that this is true, only that there was no evidence to prove to the contrary. In other words, it is theoretically possible that *everything* Connors started off with was borrowed from its sole stockholder. Nevertheless, the burden of proving undercapitalization as an indication of *alter ego* is here on plaintiffs, so that the absence of an appraisal or expert valuation evidence as to the property conveyed in

1974 cannot be blamed on H. K. Porter. Nevertheless, the court cannot agree with the opinion voiced by H. K. Porter's witnesses that Connors was "adequately capitalized". Generally accepted accounting principles dictate that demand notes like those payable by Connors to H. K. Porter should be carried as "current liabilities". By not carrying these notes as "current liabilities," the "ratio" was skewed. After the sale of the West Virginia and Birmingham plants, even H. K. Porter admits that Connors was undercapitalized, but it argues that a business which is out-of-business needs no capital. Why, then did H. K. Porter continue to lend Connors money? Why did it not send Connors to the bankruptcy court in 1983? This is a question H. K. Porter has not answered.

A one-stockholder annual meeting by Connors does not provide an absolute defense to plaintiffs' *alter ego* theory. Corporate niceties, even if observed, do not prove the lack of control necessary to establish real autonomy.

Another fact clearly appearing for the first time at the recent hearing is the looseness of the handling of H. K. Porter's "loans" to Connors. Although by the terms of the various notes from Connors to H. K. Porter, interest was required to be paid, interest rarely, if ever, was paid. This may be explained by Connors' poor performance, but it also indicates the high degree of control which the parent corporation had over the subsidiary. Obviously, the "shots were called" in Pittsburgh.

At trial H. K. Porter quarrels with the finding by the court on April 3, 1987, that H. K. Porter was the "plan administrator" of the plans here involved, as the term "plan administrator" is defined in ERISA. Not only did H. K. Porter actually designate itself as the "plan administrator" in official forms filed with the appropriate governmental authorities, but Mr. Moncrief, in effect, conceded on the witness stand that H. K. Porter was the "plan administrator" after Connors ceased operations. Whatever obligations attaches to a "plan administrator" under ERISA by virtue of holding that office attached to H. K. Porter after Connors closed its Birmingham plant. The mere fact that Blue Cross-Blue Shield of

Alabama had an arrangement with H. K. Porter to process claims for H. K. Porter and to invoice H. K. Porter for the entire cost of the insurance program, including administrative costs, did not convert Blue Cross into the "plan administrator" for all time. If Blue Cross had been the "plan administrator", Blue Cross would be an indispensible party in this case, and H. K. Porter would early have made this point under Rule 19, F.R.Civ.P. Because under ERISA there must be a "plan administrator", it had to be H. K. Porter in this case.

H. K. Porter allowed Connors to enter into a collective bargaining agreement which, without this court's attempting to analyze its language, obligated Connors beyond the life of the agreement and for the lives of the retired employees. In allowing this agreement to be negotiated, H. K. Porter may have exercised faulty business judgment, but this court is not here being asked to rescue a corporation from its entrepreneurial mistake.

Additional Conclusions of Law

It matters not whether the court has jurisdiction of this controversy under § 301 of the Labor Management Relations Act of 1947 (LMRA) or under § 502(a) of the Employment Retirement Income Security Act of 1974 (ERISA). The court has jurisdiction of this controversy under one or both of these statutes.

The ERISA provisions here pertinent are these:

> The term "administrator" means —
> (i) The person specifically so designated by the terms of the instrument under which the plan is operated;
> (ii) if an administrator is not so designated, the plan sponsor; or
> (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.
> (B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or main-

tained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

29 U.S.C. § 1002(16)(A)(B)

* * *

(a) *Prudent man standard of care*

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

29 U.S.C. § 1104(a)(1)(A)(B).

* * *

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach. . . .

29 U.S.C. § 1109(a).

Because ERISA was adopted in 1974, the same year in which Connors was incorporated in Birmingham, and has a working history of only 13 years, its judicial interpretation is as yet incomplete. Of course, this is also true of statutes and constitutional provisions 200 years old. Yet, there is obviously plenty of room remaining for the courts to tell "administrators" what their obligations are under given and differing sets of circumstances. This court has found no

binding decisions to tell this court precisely what the ERISA obligations of H. K. Porter, as "plan administrator", were and are in this case.

The court does not believe that an "administrator" owes any duty to a plan beneficiary beyond the obligations in the plan or the collective bargaining agreement itself. The "administrator", simply by virtue of meeting the definition of "administrator" in ERISA, does not assume or undertake any obligations except to be prudent and diligent in fulfilling the contractual obligations of the "sponsor". In this case, H. K. Porter was and is both the "sponsor" and the "administrator". Its fiduciary obligation to plaintiffs was and is to honor the obligations which H. K. Porter assumed in fact and by operation of law when Connors ceased operations. The insurance rights of Connors' retirees and their survivors vested upon retirement (as witnessed by their continued payment, while Connors' terminated employees received no such benefits), and the employer's failure to continue those benefits was actionable under § 301 as well as under ERISA. *United Automobile Workers v. Yard-Man, Inc.,* 716 F.2d 1476, 1482, n. 8 (6th Cir. 1983), *cert. denied,* 104 S.Ct. 1002 (1984). In legal effect, H. K. Porter became the "employer" or "sponsor" after Connors closed its doors.

For these reasons and the reasons stated in the opinion of April 3, 1987, H. K. Porter has the continuing obligation to fund the insurance program and benefits as to which the members of the plaintiff class, as previously defined, are the beneficiaries. The administrative interpretation of the documents under which H. K. Porter operated after Connors no longer had any money-making operations, is a valid and compelling tool for construing those documents and for understanding the obligations which the documents created. *Walker v. Medical Society of Mobile County,* 247 Ala. 169, 22 So.2d 715 (1945). The Eleventh Circuit has recognized this principle of Alabama law in *Noell v. American Design Inc., Profit Sharing Plan,* 764 F.2d 827 (11th Cir. 1985). The *Noell* court stated:

> "An important aid in the interpretation of contracts is the practical construction placed on the agreement by

> the parties themselves." 4 S. Williston, W. Jaeger, *A Treatise on the Law of Contracts,* § 623 at 789 (1961). This rule has been followed by the Alabama courts which have recognized that "[d]ealings of parties subsequent to the written contract are important as going to show construction by parties themselves while friendly." *Flagg-Utica Corporation v. City of Florence,* 275 Ala. 475, 156 So.2d 338, 343 (1963). "If the language [of a contract] is ambiguous or uncertain in any respect, the surrounding circumstances, including the construction placed on the language by the parties are taken into consideration so as to carry out the intention of the parties." *City of Montgomery v. Maull,* 344 So.2d 492, 495 (Ala. 1977).

Noell, 764 F.2d at 832.

While in this court's opinion the contract language clearly calls for insurance benefits to continue for retired employees after the termination of the collective bargaining agreement, the principle of interpretation above discussed resolves any doubt or ambiguity there may have been in 1983. There was no change in the *pertinent facts* between 1983 and 1987. The only change was in the mind of H. K. Porter.

The preliminary injunction will be made permanent, and certain declaratory relief will be granted.

An appropriate separate order will be entered.

DONE this 11th day of June, 1987

/s/ William M. Acker, Jr.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, et al., etc., Plaintiffs	)	CIVIL ACTION NO.
VS.	)	87-AR-0374-S
CONNORS STEEL CO., a corporation, et al., Defendants	)	

MEMORANDUM OPINION

The above-entitled action has been automatically stayed as against defendant, Connors Steel Company, because of the pending bankruptcy of Connors Steel Company.

The court has conducted an oral hearing and received evidence from plaintiffs and from defendant, H. K. Porter Company, bearing on plaintiffs' motion for a preliminary injunction under Rule 65, F.R.Civ.P., and on plaintiffs' motion for certification of a class under Rule 23, F.R.Civ.P.

By this opinion the court should not be understood as having adjudicated the case on its merits. Although in all probability, most, if not all, of the evidence on the merits has been introduced, the court does not consider the hearing as a trial on the merits and will schedule a trial on the merits in due course.

Findings of Fact As To Rule 23 Issues

It would make little sense to deny class status to the putative class which the named individual plaintiffs, Joseph D. Frost, Henry Roberson and A.C. Burttram, Jr., seek to represent. The proof shows that all of the prerequisites set forth in Rule 23(a) are met, namely:

1. The class, which approximates two hundred (200) in number, is so numerous that joinder of all members is impracticable.

2. There are questions of law and fact common to the class.

3. The claims of the representative parties are typical of the claims of the class.

4. The representative parties will fairly and adequately protect the interests of the class.

The proof also shows that the additional requirements of Rule 23(b)(2) are met, namely:

> The party opposing the class, namely, H. K. Porter Company, has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Findings of Fact
As To Rule 65 Issues

The court has evaluated the evidence as it bears on the four factors which must be considered in deciding whether or not to issue a preliminary injunction. The court finds:

1. Petitioners have made a strong showing that they are likely to prevail on the merits. The evidence, while conflicting in certain important respects, particularly as to plaintiffs' *alter ego* theory, is clear that H. K. Porter Company continued to fund the hospital and medical benefits obligations of its wholly owned subsididary, Connors Steel Company, long after Connors Steel Company was no longer an operating company and after Connors Steel Company was, by any reasonable definition of "insolvency", "insolvent." It is difficult to explain such sizable expenditures by a non-eleemosynary, stockholder-owned institution without there being a sense of legal obligation to make those expenditures. Moral obligations are rarely recognized in the corporate world, and for good reasons, stockholders' derivative suits being one. The payments may be explained by the language of the plans themselves, which must be construed in favor of

its beneficiaries and which, reasonably construed, hold out to pre-1983 retirees and their survivors continued medical and life insurance benefits, even after the termination of the collective bargaining agreement which existed when the plans were last adopted.

At least for the purpose of funding plaintiffs' benefits, H. K. Porter Company acted as a "successor employer" as that term is described in *NLRB v. Burns Security Services,* 406 U.S. 272, 284, 92 S.Ct. 1571, 1580 (1972). The *Burns* court noted that the "successor corporation," even though it had not signed the collective bargaining agreement, might decide to honor its provisions and thus be bound by them. Specifically, the Supreme Court said:

> In many cases, of course, successor employers will find it advantageous not only to recognize and bargain with the union but also *to observe the pre-existing contract rather than to face uncertainty and turmoil.* Also, in a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchase, *the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract.*

92 S.Ct. at 1584 (emphasis supplied).

The Supreme Court further noted in *Howard Johnson Co. v. Detroit Local Joint Executive Board, Hotel and Restaurant Employees,* 417 U.S. 249, 94 S.Ct. 2236 (1974), as follows:

> . . . the real question in each of these "successorship" cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative? *The answer to this inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue,* whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc. There is, and can be, no single definition of "successor" which is applicable in every legal context. *A new employer, in other words, may be a successor for some purpose and not for others.*

94 S.Ct. at 2243 n. 9 (emphasis supplied).

While these cases deal with operating companies which have employees and with union contracts, and not with retiree's

benefits, and thus are distinguishable, the legal principles may apply in the ERISA context, particularly where the benefits here were conferred pursuant to a collective bargaining agreement. In other words, by honoring Connors Steel Company's obligations, H. K. Porter Company may have assumed them.

An aspect which compounds H. K. Porter Company's problem, as well as perhaps explains H. K. Porter Company's actions, is its designation as the "plan administrator," a term of art which automatically triggers some sort of ERISA fiduciary obligation running from the "plan administrator" in favor of the "beneficiaries." ERISA is a new enough statutory scheme so that the courts have not fully explored all of the nuances of this fiduciary obligation. Nevertheless, H. K. Porter Company finds itself with conflicting obligations as between the plan beneficiaries and its own stockholders, the necessary by-product of the 1974 incorporation of Connors Steel Company as a subsidiary.

Although *Harris v. Pullman standard, Inc.,* slip op. at 1491 (11th Cir. Feb. 13, 1987), decided on February 13, 1987, is clearly distinguishable from the instant case, it does deal with the ERISA obligations of the administrator of an employment benefit plan, and it is further similar to the instant fact situation in that the problem arose as a result of the closing and sale of a plant and the employer's efforts to rid itself of onerous obligations of former employees. There, the Eleventh Circuit said:

> The administrator of an employment benefits plan cannot deny benefits to employees in an arbitrary and capricious manner. *Griffis v. Delta Family-Care Disability,* 723 F.2d 822, 825 (11th Cir. 1984), *cert. denied,* 467 U.S. 1242, 104 S.Ct. 3514, 82 L.Ed.2d 823 (1984). The courts, in reviewing such decisions, must weigh the following facts to determine if the denial was arbitrary and capricious: (1) uniformity of construction, (2) "fair reading" and reasonableness of that reading; and (3) unanticipated costs. The following three additional factors are evidence of the plan administrator's good faith: (1) internal consistency of a plan under the interpretation given by the administrator or trustees; (2) any relevant regulations formulated by the appro-

> priate administrative agencies; and (3) factual background of the determination by a plan and any inferences of lack of good faith. *Dennard v. Richards Group, Inc.*, 681 F.2d 306, 314 (5th Cir. 1982).

Slip op. p. 1493.

The importance of *Harris v. Pullman Standard,* if it has any importance, is that Pullman Standard was both the "plan administrator" and the pocket from which the benefits were being paid. The Eleventh Circuit affirmed the district court's requirement that the benefits be paid.

The court is, of course, aware of the opinion of Honorable Robert J. Staker of October 5, 1986, in *James D. Keffer, et al. v. Connors Steel Company, et al.*, CV 84-3137, in the Southern District of West Virginia. The court has discussed with Judge Staker this case and the *Keffer* case. There are similarities and differences between the two cases. In *Keffer,* Judge Staker held, at page 33 of his memorandum opinion:

> What the evidence does show that Connors was, but that H. K. Porter was not, is a party to the 1974, 1978 and 1981 contracts and related contract documents under the terms of which Connors became obligated to provide that medical coverage. By no means is there sufficient evidence in the record to support a finding that Connors ever acted as the *alter ego* and/or agent of H. K. Porter, such being so obviously true . . . that no authority need be cited to support the holding.

Prior to Connors Steel Company's bankruptcy, Judge Staker held that Connors Steel Company did not escape the continuing obligation to retirees just because the collective bargaining agreement had come to an end. Connors Steel Company complied with Judge Staker's order of October 5, 1986, until its bankruptcy. In other words, until the bankruptcy the issue of H. K. Porter Company's indirect or vicarious liability was academic. No doubt it was out of H. K. Porter Company's pocket that Connors Steel Company honored Judge Staker's order. In the instant case, H. K. Porter Company, for good reason, does not claim that *Keffer* is available as a *res judicata* defense.

Plaintiffs may have failed to prove by a preponderance of the evidence, properly analyzed, the entire laundry list of

twelve factors to be used in determining whether or not a parent corporation is the *alter ego* of its subsidiary. This list is outlined in *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 691 (5th Cir. 1985). Of course, it is not necessary that plaintiffs prove the existence of all twelve factors. The Fifth Circuit did not weight the twelve factors in their order of significance. The court finds that enough of these factors do exist, without taking the time to mention each one, to indicate the necessary degree of control by H. K. Porter Company over Connors Steel Company to constitute an *alter ego* relationship in this case.

Whether or not H. K. Porter Company was and is the *alter ego* of Connors Steel Company, and therefore liable for Connors Steel Company's obligations to plaintiffs, there is a third theory which exists, independent of either the *alter ego* or the "successor corporation" theory. It is founded on the ancient, honorable, equitable concept that officers and directors of an insolvent corporation are trustees for its creditors and cannot prefer a parent corporation as a creditor. The fact here of overlapping officers and directors implicates this doctrine, which applies even though the parent may be a secured creditor. In other words, it may have been incumbent on H. K. Porter Company to forgive Connors Steel Company's debt, at least to the extent necessary for Connors Steel Company to fund its continuing contractual obligations to these beneficiaries of its health and life insurance plans.

There is no doubt but that H. K. Porter Company lost very substantial sums in the Birmingham operation known as Connors Steel Company. The ultimate question in this case will be whether or not H. K. Porter Company can staunch its Connors Steel Company hemorrhage by the expedient which it now attempts to effectuate, namely, the contemporaneous bankruptcy of Connors Steel Company and the notice to plaintiffs of the termination of their benefits.

2. Petitioners will be irreparably injured if an injunction does not issue. Nothing would be more devastating to the pre-1983 Connors Steel Company retirees and their survivors than to lose their hospital and medical benefits,

especially those in the plaintiff class who are not presently employed or covered by some other medical plan, and even more especially those who are sick and in need of expensive medical attention. It is impossible for the court to distinguish between, or to grade, the varying needs of the individual class members and the relative harms which may be caused by the termination of their individual medical benefits. In a trial on the merits, such distinctions may be drawn.

3. While a preliminary injunction will cause harm to H. K. Porter Company, such harm does not compare with the harm which will be caused plaintiffs if an injunction does not issue. This is especially true since the court will require a more than adequate injunction bond.

4. The public interest will be better served by placing the financial burden of funding the health benefits and life insurance here involved on H. K. Porter Company than on the general public or on the impecunious plaintiff class members.

Conclusions of Law

The court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337 and 29 U.S.C. §§ 185 and 1132.

The automatic stay as to defendant Connors Steel Company does not apply to defendant H. K. Porter Company.

The function of a preliminary injunction is to preserve the status quo pending a trial on the merits on the prayer for permanent injunctive relief. *Collum v. Edwards,* 578 F.2d 110 (5th Cir. 1978). This is what the court here is attempting to do. The court fully realizes that time is of the essence in this case. It is for this reason that the court has expedited consideration of the request for class determination and a preliminary injunction and has expedited the writing of this opinion. Because this opinion is written in haste, the court reserves the right, within 10 days, to supplement these findings and conclusions.

Based on the foregoing findings, the court concludes that a class should be certified and that a preliminary injunction should issue. An appropriate separate order will be entered.

DONE this 3rd day of April, 1987.

/s/ William M. Acker, Jr.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE